

ELECTRONIC SURVEILLANCE MODERNIZATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

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ELECTRONIC SURVEILLANCE MODERNIZATION ACT

TUESDAY, SEPTEMBER 12, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:10 p.m., in Room 2141, Rayburn House Office Building, the Honorable Daniel E. Lungren (acting Chair) presiding.

Mr. LUNGREN. The Subcommittee will come to order.

Yesterday marked the fifth anniversary of the terrorist attacks that killed nearly 3,000 Americans. As we remember the loss of our fellow citizens, a recurring question is raised regarding whether America is safer today than it was on September 11, 2001.

The fact that we have not had an attack since 2001 on U.S. soil is something we can all be thankful for. One commentator called it the best-blessed nonevent that we have seen in the last 10 years. Whatever, this is certainly more than just a matter of luck.

Recent revelations in the press and by the Administration itself indicate the extent to which they have acted to protect the American people from another event of such cataclysmic proportion, and the Congress has acted in aid of the Administration over these last 5 years as well. However, this is not the sole question we should ask.

Safer does not mean that there is any room for complacency as the events in Bali, Madrid, Oman others, including London on 7/7, indicate we are still at war with an enemy that is fully devoted to one thing; that is the murder of innocent people.

In this regard, it is a primary responsibility of Government to protect its citizens from violence. Understanding this, Congress must ensure that the law enforcement and the intelligence communities are equipped with the proper tools to fight a 21st century war against an enemy which operates by stealth and surreptitious means.

This Congress has already acted to provide law enforcement and intelligence officers with enhanced capability through the enactment of important legislation like the USA PATRIOT Act, Homeland Security Act and Intelligence Reform Act. Now we need to streamline the FISA process and make it technology neutral.

These are the express goals of H.R. 5852, the Electronic Surveillance Modernization Act. Today we will hear testimony on the bill

and suggestions for possible improvements to the legislation in order to achieve these goals.

Also I would mention that Members of the full Committee were able to attend a closed briefing earlier this afternoon on this subject. Many Members took advantage of that opportunity to participate and ask questions; and it is as a result of that, we are starting this hearing a little bit later than it was noticed for, and for that I apologize, but we needed to have an opportunity for Members to return and also for several members of our panel time to get here as well.

I look forward to the constructive suggestions our witnesses will offer on how to improve FISA so that we may meet the new challenges posed to our Nation by the specter of terrorism and by the fact of advances in technology.

With that, I am privileged to recognize the Ranking Member from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. And I appreciate your holding an additional hearing on this important issue affecting our traditional notions of rights, liberties and protections from Government intrusions into our private affairs in the context of secret surveillance without the benefit of court approval or review.

One reason I feel that we need to hear more about the impact of the pending legislation is because I feel that we are in the absolute dark about what the legislative—about what the legislation affects.

Let me be clear, the primary problem confronting Congress, in my view, is the issue of whether we are performing our constitutional oversight responsibilities when we do not hold the Administration accountable to following the process we set up for conducting surveillance involving American citizens in America. If there is some difficulty with the procedures, we would expect the President to bring those to our attention and work with us in our attempt to address them just as we have done with the USA PATRIOT Act bill and the 25 amendments to FISA that we have passed since 9/11/2001.

We do not expect the President to ignore the laws that are passed and enacted because he considers them inconvenient or to set up his own secret process around the laws that he only reveals when he is caught, declaring that he is following his own set of laws and procedures he wrote pursuant to powers he declares upon himself under the Constitution. I find it insulting and disingenuous to our system of laws and procedures for someone to suggest that it is inconvenient for the President to comply with the laws when they require obtaining a warrant or court order.

If he is doing what he has chosen and indicates he is doing, that is, surveilling only al-Qaeda members and those who act with them, then obviously a FISA court order could be obtained. Consequently, I am left to wonder whether the real reason the Administration does not submit the matter to the FISA court is because of concerns that the available information would not justify a warrant.

The problem is, we don't know, and I believe our oversight requires us to know and ensure the American people that the President's surveillance activities are within the rule of law. If the ra-

tionale of the legislation, if it were amended, is the hope that the President will find them enough to his liking to actually use them, then he doesn't—and when he doesn't choose to keep his actions in complete secrecy, I am not clear on the need or the desirability of the legislation. In other words, if the legislation does not control the parts of the TSP affecting American citizens in America, then what is the point of this legislation? I think our Founding Fathers would be shocked to learn that we had created an unbridled power in the President to secretly conduct surveillance involving Americans in America without the approval of courts. And I do not believe the courts will find that he has that authority.

So I certainly do not want to see legislation that would purport to establish or recognize such a power in the President, but I fear the bill before us does. And even if we were sure that the legislation required the President to conduct a domestic surveillance pursuant to it, I would be concerned about the broad loopholes it creates in taking currently covered surveillance activities outside of FISA through redefining what constitutes, quote, “electronic surveillance.”

I would also be concerned with what we mean by provisions in the bill as to what constitutes an armed attack triggering a warrantless 60-day window. Was the attack on the American embassy in Syria this morning an armed attack that would provoke a 60-day warrantless period in this country?

And I also want to know what is meant by a “terrorist attack” in the bill which invokes potentially endless renewed 45-day warrantless periods. Would it include attempts or conspiracies to launch a terrorist attack? If not, why not? And was the recent plot discovered in Great Britain to blow up planes headed for the United States such a terrorist attack?

Those are just a few of the problems I have with the bill in the context under which we are considering it. We do not have in any recommendations, specific recommendations, from the Administration one way or the other. And so we are left with the idea that if we take up the bill tomorrow, as we are presently scheduled to do, we can assume that we will pass something, not knowing what the implications would be. The bill would be rewritten at some point in the procedure, and we would be stuck—as we were with the PATRIOT bill, having reported a bill with unanimous vote in Committee and then, hot off the press, have to consider something else entirely different on the floor of the House.

So, Mr. Chairman, I look forward to the testimony of the witnesses and hope they can at least let us know what is going on today, so we know what we are dealing with and how we can perhaps deal with the few glitches there may be without broad-scale overhaul of the FISA in a way that we don't know what we are doing.

Thank you, Mr. Chairman. I yield back.

Mr. LUNGREN. I thank the gentleman from Virginia. I was not here when we passed the original PATRIOT Act, so I can't comment on that. But I think I will put you down on as undecided on the bill before us.

It is the practice of the Subcommittee to swear in our witnesses appearing before it, so if you would please stand and raise your right hand.

[Witnesses sworn.]

Mr. LUNGREN. Please let the record show that each of the witnesses answered in the affirmative.

I am sorry, Mr. Conyers, who is the Ranking Member of the full Committee, is recognized for any statement he would wish to make at this time.

Mr. CONYERS. I want to thank Chairman Lungren and just ask unanimous consent to put my statement in the record.

Mr. LUNGREN. Without objection.

Mr. CONYERS. And I just want to make a point.

It has not been—first of all, I want to subscribe to what Ranking Member Scott has said, particularly with reference to the lack of time that we are having to get this matter worked out. I think that the time line is going to be very difficult for us to make, and I will probably be seeking the Chairman of the Subcommittee and the full Committee's approval that we work out something different from a disposition within the next 24 hours, which might be pretty hard to do.

Now, the question is whether we can refine the Foreign Intelligence Surveillance Act or do we need to gut it in order to make the objectives that we most generally say that we want to make here?

The Committee is handicapped by the fact that after 9 months, when we learned of the warrantless surveillance program, that we haven't done much about inquiring into its appropriateness, legality or how we deal with it, so that coming into this as quickly as we are, it is a pretty difficult task.

And so, in conclusion, I think the lesson of the last 5 years is that if we allow intelligence, military and law enforcement to do their work free of legislative oversight, if we give them requisite resources and modern technologies, we want them to connect the dots in a nonpartisan manner, we can protect our citizens.

Let's fight terrorism. But we need to fight it the right way, consistent with our Constitution and in a manner that serves as a model for the rest of the world. And I am not sure that the major legislative proposal that we have before us meets that test.

And I thank the Chairman for allowing me to intervene.

Mr. LUNGREN. I thank the gentleman.

[The prepared statement of Mr. Conyers is published in the Appendix.]

Mr. LUNGREN. All Members are informed that any opening statement they would like will be made a part of the record. And I welcome our witnesses to this legislative hearing on H.R. 5825, the "Electronic Surveillance Modernization Act."

We have four distinguished witnesses with us today. Our first witness is Mr. John Eisenberg, Deputy Assistant Attorney General with the United States Department of Justice's Office of Legal Counsel. Mr. Eisenberg was appointed to his current position this past March. Prior to joining the department, he clerked for the Honorable Judge Michael Luttig of the Fourth Circuit and for Supreme Court Justice Clarence Thomas in 2003. Mr. Eisenberg ob-

tained his undergraduate degree from Stanford University in 1991, his law degree from Yale University Law School in 2001.

Our second witness is Mr. Vito Potenza, the Acting General Counsel at the National Security Agency. Prior to joining NSA Mr. Potenza was staff attorney for the District of Columbia Public Defender Service. He began his career with the NSA in 1980 as a principal litigation attorney, and until recently was assigned the position of Deputy General Counsel, a role he has filled since 1993; served as a key advisor to the Director and senior staff in the Agency's efforts to combat global terrorism. Mr. Potenza's contribution to the NSA and the Department of Defense have been recognized by Presidential Rank Award, and the Secretary of Defense Medal for Meritorious Civilian Service, graduated cum laude from Union College in New York with a degree in political science, and received his law degree from Georgetown University Law Center.

Our third witness is Ms. Kate Martin, Director of the Center for National Security Studies. In addition to her 14 years at the center, Ms. Martin has taught strategic intelligence public policy at the Georgetown University Law School, and also served as General Counsel to the National Security Archive Research Library at George Washington University. She is the author of numerous articles and was awarded the Eugene Pulliam First Amendment Award in 2005 by the Society for Professional Journalists.

Ms. Martin graduated cum laude from Pomona College, and received her J.D. from the University of Virginia Law School.

Our final witness is Bruce Fein, principal of Bruce Fein & Associates and The Litchfield Group. He has held several positions with the Department of Justice, served as Assistant Director of the Office of Legal Policy, Legal Adviser to the Assistant Attorney General For Antitrust and the Associate Deputy Attorney General. He has been a Scholar with the American Enterprise Institute, Heritage Foundation, a lecturer at the Brookings Institute, and Adjunct Professor at George Washington University. Additionally, he was Executive Editor of *World and Intelligence Review*, a periodical devoted to national security and intelligence issues. Mr. Fein graduated Phi Beta Kappa from the University of California at Berkeley and cum laude from Harvard Law School.

As you may know, our procedures here in the Subcommittee are to have statements by our panelists of 5 minutes. I'll try and keep you close to that, and then Members will have opportunity for questions. Your prepared remarks will be, in their entirety, placed in the record, and we will ask you to make your statements in the order in which you received them with Mr. Eisenberg going first.

Mr. Eisenberg.

TESTIMONY OF JOHN EISENBERG, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. EISENBERG. Thank you, Chairman Lungren, Ranking Member Scott and Members of the Subcommittee. We appreciate the opportunity to appear before you today to discuss proposed revisions to the Foreign Intelligence Surveillance Act of 1978, or FISA.

Yesterday, our Nation remembered the horrific attacks of just 5 years ago, the single deadliest foreign attacks on U.S. soil in our

Nation's history. On that day 5 years ago, we recognized what our enemies had known long before 9/11: We were at war.

Although we have done much to make America safer, our enemy is patiently waiting to strike again. We must never forget this, and together we must strive to do everything in our power and within the law to see that it never happens again. At the same time, of course, we must steadfastly safeguard the liberties we all cherish. We believe that we can reframe FISA to serve both of these goals better.

We have been asked to return today to address the Committee's specific questions about H.R. 5825, and we are pleased to do so. We have outlined additional specific concerns in our written testimony, and in the interests of saving time, I will highlight a few of these points here.

We think we can protect national security and civil liberties at the same time, and any FISA amendments should be geared to this end. Specifically, we think that we can redefine electronic surveillance to exclude certain categories that are currently within the statute and that this would streamline things. We think we can streamline applications so that the Foreign Intelligence Surveillance court receives the information it needs to make decisions, but that does not overly burden the executive branch in getting it that information.

We think that certain types of agents of a foreign power should be added to the list in FISA. We think that a provision such as section 8 modified for programs should be available. And we think that any package that addresses the problems we currently face should address litigation management because of the litigation we face today.

We look forward to your questions.

Mr. LUNGREN. Thank you very much.

[The prepared statement of Mr. Eisenberg follows:]

JOINT PREPARED STATEMENT OF JOHN A. EISENBERG AND VITO T. POTENZA

STATEMENT OF

**JOHN A. EISENBERG
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE**

AND

**VITO T. POTENZA
ACTING GENERAL COUNSEL
NATIONAL SECURITY AGENCY**

**BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**LEGISLATIVE PROPOSALS TO UPDATE THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT (FISA)**

**PRESENTED ON
SEPTEMBER 12, 2006**

Thank you, Chairman Coble, Ranking Member Scott, and Members of the Subcommittee. We appreciate the opportunity to appear before you today to discuss proposed revisions to the Foreign Intelligence Surveillance Act of 1978, or "FISA."

Yesterday, our Nation remembered the horrific attacks of just five years ago, the single deadliest foreign attacks on U.S. soil in our Nation's history. On that day five years ago, we recognized what our enemies had known long before 9/11—we are at war. Although we have done much to make America more safe, our enemy is patiently waiting to strike again. We must never forget this, and together we must strive to do everything in our power—and within the law—to see that it never happens again. At the same time,

of course, we must steadfastly safeguard the liberties we all cherish. We believe that we can reframe FISA to serve both goals better.

We have been asked to return today to address the Committee's specific questions about H.R. 5825 and we are pleased to do so. We have outlined additional specific concerns below and we look forward to your questions.

We will begin by addressing section 8 of H.R. 5825, which would authorize electronic surveillance without a court order following a terrorist attack on the United States. As we have explained, Representative Wilson's legislation correctly recognizes that the nature of the terrorist threat may require the President to authorize a program of electronic surveillance outside FISA's traditional procedures. However, we believe that the current version of section 8 is flawed.

Our concern with this provision is that it would purport to require the President to *await an attack on the United States* before initiating an electronic surveillance program. It would also limit surveillance under the program to the communications of those affiliated with the terrorist organization responsible for the specific attack that triggered the authorization. These limitations would artificially constrain our intelligence capabilities, making it more difficult to detect and prevent new attacks. We urge that this provision be amended to provide additional authority for the President to initiate electronic surveillance programs when the best intelligence indicates that there is a threat of an attack. Toward this end, we commend the concepts suggested in Senator Specter and Senator DeWine's bills, each of which offers a constructive approach for providing the President with additional authority to implement intelligence operations like the Terrorist Surveillance Program.

Representative Wilson's bill also proposes several important changes aimed at modernizing FISA to address the new technologies—and new threats—of the 21st Century. We support these efforts, which we think are a critical part of our ongoing efforts to improve and transform our intelligence capabilities. In his testimony before this Committee last week, Mr. Deitz explained how the revolutions in telecommunications technology have brought within FISA's scope communications that we believe the Congress did not intend to be covered when it enacted FISA almost 30 years ago. Many of the changes Representative Wilson's bill proposes would help refocus FISA on judicial oversight of surveillance of domestic conversations and would also streamline some of FISA's procedures in a manner that will allow for the more nimble collection of intelligence against the foreign threats we face today. FISA would thereby better protect privacy rights of Americans and the national security.

First and foremost, the bill would change the definition of "electronic surveillance" in title I of FISA to restore FISA's original focus on surveillance of domestic communications. In 1978, Congress carefully considered what sorts of collection should fall within FISA's coverage and what should fall outside. As this Committee is now well aware, changes in technology and in our enemies' methods have upset the balance Congress struck in 1978. Representative Wilson's bill would help to restore FISA to its original focus by generally excluding surveillance of international communications where the Government is not targeting a particular person in the U.S. This change would update FISA to make it technology-neutral and to reinstate FISA's original carve-out for foreign intelligence activities in light of changes in international communications technology that have occurred since 1978.

With respect to the definition of electronic surveillance, we offer two suggestions for further focusing the definition appropriately. First, we would recommend slightly reworking new section (f)(1) as follows: “the installation or use of an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing the surveillance at a particular known person who is reasonably believed to be in the United States under circumstances in which that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.” This change would clarify that the appropriate inquiry under FISA is where and at whom is the surveillance directed. This way, FISA can better serve the goal of protecting the privacy of persons in the United States. We also recommend clarifying, with respect to section (f)(2) of Representative Wilson’s bill, that acquisition would fall within the scope of the definition if both the sender and all intended recipients are “reasonably believed to be” located within the United States. This would assist our Intelligence Community given the difficulties that sometimes arise in pinpointing precise locations of persons communicating.

Representative Wilson would also change the definition of “agent of a foreign power” to include any person other than a U.S. person who possesses or is expected to transmit or receive foreign intelligence information while within the United States. This change would close a gap in our ability to use FISA to obtain valuable foreign intelligence information. Occasionally, a foreign person will enter the United States in circumstances where the Government knows that he possesses valuable foreign intelligence information, but where that person’s relationship with a foreign power or

international terrorist organization is unclear. Unfortunately, the Government currently has no means to conduct surveillance of that person under FISA.

We support Representative Wilson's proposal, but offer a few recommendations. First, we recommend narrowing its application to situations in which the relevant information is deemed "significant" foreign intelligence information. Second, we propose adding another category to the definition of agent of a foreign power—one that would cover a person who "engages in the development or proliferation of weapons of mass destruction, or activities in preparation therefore for or on behalf of a foreign power." This added definition would expressly address one of the gravest threats we currently face.

Representative Wilson's bill would also provide a new and streamlined Attorney General certification process permitting the Attorney General to direct electronic communications service providers to provide certain information, facilities, or technical assistance for a period of up to one year, provided that the provision of these resources does not constitute "electronic surveillance." The Administration supports adding such a process. However, we recommend imposing restrictions on the manner in which information obtained through this process is used and creating mechanisms for the FISA Court to review and enforce these directives. We can work with the Committee to provide language implementing these suggestions.

Other provisions in Representative Wilson's bill are aimed at streamlining the traditional FISA process. Section 4 of the legislation would reduce the amount of paperwork required to submit a FISA application, and section 5 would extend the period

of surveillance permitted under FISA's "emergency authorization" provisions from 72 hours to five days. We welcome such changes.

At the same time, we believe that any legislative package must deal with the litigation arising from the Terrorist Surveillance Program and other alleged classified intelligence activities. Such litigation risks national security by increasing the risk of additional disclosures and by subjecting vital intelligence activities to the unpredictability of varying and sometimes conflicting court decisions. Traditionally, the state secrets privilege has blocked or at least curtailed such litigation. But we face an unprecedented wave of litigation and urge Congress to act to protect sensitive national security programs.

Finally, we respectfully take issue with certain aspects of the oversight provisions in Representative Wilson's bill. In particular, section 8 would require that reports to Congress provide detailed information on each individual target of an electronic surveillance program—a requirement that would be burdensome to satisfy, and would add little meaningful information to the oversight committees. We are willing to work with Representative Wilson and this Committee to develop reporting requirements for electronic surveillance programs that provide Congress with the information it needs without overly burdening intelligence and law enforcement personnel. More generally, we believe that the longstanding laws and traditions concerning intelligence committee oversight have been effective and workable, and we therefore have concerns with changes that would amend the National Security Act in a manner that alters these settled understandings.

* * *

Again, Mr. Chairman, thank you for the opportunity to appear today to discuss this important issue.

Mr. LUNGREN. Mr. Potenza.

**TESTIMONY OF VITO POTENZA, ACTING GENERAL COUNSEL,
NATIONAL SECURITY AGENCY**

Mr. POTENZA. Congressman Lungren, Ranking Member Scott, Members, I do not offer a separate statement. We join the statement that was submitted by Mr. Eisenberg in the Department of Justice.

I believe the comments offered last week by Mr. Deitz covered the groundwork, and I would be pleased to answer any additional questions.

Mr. LUNGREN. And I understand you are here instead of Mr. Deitz because since he last testified before us and went under the grilling of Mr. Scott, he is no longer in that position; is that correct?

Mr. POTENZA. That's correct, sir.

Mr. LUNGREN. Actually, he has moved on to another position working for General Hayden; is that correct?

Mr. POTENZA. Yes, sir.

Mr. LUNGREN. All right.

[See page 7 for joint prepared statement.]

Mr. LUNGREN. Ms. Martin.

**TESTIMONY OF KATE MARTIN, DIRECTOR,
CENTER FOR NATIONAL SECURITY STUDIES**

Ms. MARTIN. Good afternoon, Chairman Lungren and Ranking Member Scott. I want to thank you for the opportunity to testify here today, and I confine my remarks to a couple of basic points.

First, I would like to second the testimony that you heard last week from the Center for Democracy and Technology, but today talk specifically about H.R. 5825, the Wilson bill that is before you, and make the first point that the bill would radically amend the Foreign Intelligence Surveillance Act and eliminate the basic framework of that statute.

The many changes in the bill are very complicated. It is difficult to understand them, and I don't think we have had an adequate explanation from the bill's sponsors or the Administration of how the changes would actually work and what they are intended to do.

Nevertheless, it is clear that the bill would create such large loopholes in the current warrant requirements that judicial warrants for secret surveillance of Americans' conversations and e-mail would be the exception rather than the rule.

First, I want to make clear that I don't think that we have heard yet any problems identified by Administration witnesses that would justify such a wholesale rewriting of the statute. The two basic problems that have been referred to are the timing issue that the Attorney General talked about when he was asked to testify and that can be addressed by streamlining extra resources, a much more narrow fix than is contained in this bill.

And the second specific problem that was identified by Mr. Deitz last week was that foreign-to-foreign communications that happen to travel through switches or facilities in the United States and are intercepted in the United States are thereby subjected to the FISA warrants requirement.

We agree that communications between foreigners located overseas are not subject to the fourth amendment, and if it should happen that they are available for interception in the United States, no FISA warrant should be required. That is a fix that can be easily drafted, we believe, and there is some language to that effect.

That is not the fix that the Wilson bill is addressed to. Instead, it contains basically at least two radical changes to the FISA. The first is that it would radically expand the exception in the FISA that allows the Attorney General to wiretap individuals inside the United States without a warrant.

The current law allows the Attorney General to wiretap what are basically foreign embassies without obtaining a warrant. That is an exception that we have always supported. The Wilson bill would expand that exception to allow the Attorney General to wiretap literally millions of individuals in the United States without a warrant and without any determination that they are suspected of terrorism, espionage or sabotage. And, obviously, in wiretapping those millions of individuals inside the United States, the NSA would be enabled to seize millions of conversations between those noncitizens and citizens and U.S. persons inside the United States.

Secondly, the bill would enable the NSA and the Government to vacuum up conversations between Americans and individuals overseas as long as the interception was not targeted at a particular individual in the United States.

So, for example, the bill specifically anticipates that if the NSA turned on its machines to seize an entire stream of communications between New York City and Israel, for example, that that interception would not be covered by the warrant requirement of FISA. It then permits the Government, after it has seized those millions of communications, to use a surveillance device, quote, unquote, to then select individual communications from that stream and target individual, named Americans who have been—over a part of that stream, and listen to their communications without a warrant.

We believe that these amendments and this approach is unnecessary. It has not been justified as to why they can't go to the court; and most fundamentally, it violates the fourth amendment's requirements of both a judicial warrant and that there be individualized probable cause that individual that the United States Government wants to listen to is engaged in some kind of wrongdoing.

Thank you.

Mr. LUNGREN. Thank you very much.

[The prepared statement of Ms. Martin follows:]

PREPARED STATEMENT OF KATE MARTIN

We would like to second the testimony that has previously been provided to you by the Center for Democracy and Technology on the NSA surveillance and FISA generally. Today, I would like to make four points about H.R. 5825, the "Electronic Surveillance Modernization Act" introduced by Reps. Wilson, Hoekstra and Sensenbrenner and others.

First, the bill is not focused on and is not a fix for those problems identified by the Attorney General and other administration officials in testimony before the Congress concerning the justification for the warrantless surveillance being conducted by the NSA.

Second, the bill instead would radically amend the Foreign Intelligence Surveillance Act and eliminate the basic framework of FISA. The many changes in the bill are complex and it is especially difficult to understand how they all work together. Neither the administration's witnesses nor the bill's sponsors have explained its op-

eration in any detail. Nevertheless, it is clear that the bill would create such large loopholes in the current warrant requirements, that judicial warrants for secret surveillance of Americans' conversations and e-mail would be the exception rather than the rule.

Third, the changes in the bill would gravely threaten individual liberty and privacy and pose new risks to important counter-terrorism efforts. As described in more detail below, the warrantless surveillance of Americans' communications that would be authorized by the bill would clearly violate the Fourth Amendment and the data-mining that would be authorized by the bill would constitute an additional grave threat to everyone's privacy. Allowing broad surveillance diverts scarce counter-terrorism resources from focusing on individuals for whom there is reason to believe that they are engaged in terrorist plotting and instead encourages the government to spend valuable resources data-mining on millions of innocent Americans.

In addition, the bill threatens to destroy the basic framework of FISA, which has been accepted by courts as an appropriate and constitutional method for conducting secret surveillance of Americans. FISA "embodies a legislative judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the fourth amendment." S. Rep. No. 95-701, at 13 (1978). Before 9/11, FISA surveillance was universally upheld by the courts against legal challenges. Since the announcement of the President's decision to conduct surveillance outside the bounds of FISA and without judicial warrants, three district courts have rejected government claims defending the surveillance. Eliminating the constitutional grounding and certainty found in the FISA, by radically amending it, leaves government intelligence officers at personal risk and jeopardizes potential criminal convictions based on such surveillance.

Fourth, as others have pointed out, Congress is being asked to legislate about Americans' most basic liberties, while being kept in the dark about the surveillance. While the administration swears that they are not listening to domestic-to-domestic calls without a warrant, we do not know whether they did so for some period after 9/11. We do not know whether they still have those communications if they did. We do not know whether there are other programs, which involve listening to Americans' overseas communications without a warrant, where one of the parties to the calls is NOT an Al Qaeda suspect. Finally, we do not know—although there is every reason to suspect—whether the government is gathering all the addressing/to/from information on millions of communications, including domestic to domestic communications: who called whom, when, and for how long. We do not know how such information is being data-mined and collated with the vast amounts of information otherwise available to the government to create giant maps of Americans' associations as part of massive computerized dossiers on millions of individuals.

1. H.R. 5825 IS NOT A RESPONSE TO THE PROBLEMS IDENTIFIED BY ADMINISTRATION OFFICIALS.

Various administration spokesmen have referred to various problems in FISA that interfere with important intelligence-gathering. The Attorney General first claimed that the process of getting a warrant took too long; now there are references to technological developments and the use of disposable cell phones; Mr. Deitz spoke last week of the requirement to get a FISA warrant in certain circumstances even when the communications being intercepted involved a foreigner overseas talking to another foreigner overseas. Although he failed to explain why that was the case, it is clear that the FISA requires a warrant when the communication is seized in the US, no matter where the communication is traveling to and from. In recent years, more and more international to international communications may be randomly routed through switches in the US and if the NSA seizes the communications at those switches rather than off international satellites, the law technically requires a warrant.

However, H.R. 5825 does not address these identified problems (except by eliminating most of the FISA warrant requirements for all communications.) If these are indeed real problems, each of them is fixable by targeted legislation that leaves the Fourth Amendment and its warrant requirement intact. The Harman-Conyers bill would streamline the FISA process and provide more time to obtain a warrant; the Congress just amended the FISA to address disposable cell phones in the Patriot Act; and the foreign-to-foreign problem could be fixed by narrowly targeted legislation addressing the interception of such communications in the United States.

2. CONGRESS STILL HAS AN INCOMPLETE PICTURE OF THE SURVEILLANCE AND ANY EXISTING DIFFICULTIES.

At the same time, it is clear that the administration is being less than forthcoming about the warrantless surveillance and what problems it may be encountering under FISA. When the Attorney General first testified, he did not mention the foreign-to-foreign problem. That problem has presumably been around since before 9/11 and no one has explained why the administration did not seek a fix for it in the Patriot Act. In addition, Representative Harman and Senator Feinstein, who according to the administration, have been fully briefed on the program, have both said that they believe the program could function under FISA. Indeed, if the President's description is accurate, the Attorney General could simply go to the FISA court and request the orders required by federal law.

Perhaps most importantly, it seems clear, as I outlined at the beginning, that we do not know whether there are other programs, in addition to the Terrorist Surveillance Program described by the President, operating outside the law. The fact that administration witnesses keep mentioning new problems, which don't appear related to that program—like the foreign-to-foreign problem—while failing to submit draft legislation to fix any problems, raises serious questions.

In this context, the breadth of the warrantless surveillance that would be authorized by both H.R. 5825 and Senator Specter's bill, which has been endorsed by the Justice Department, raises disturbing questions about the breadth of the actual surveillance, that either was conducted in the past or is planned for the future, even if not ongoing at present.

3. H.R. 5825 WOULD MAKE WARRANTLESS SURVEILLANCE THE EXCEPTION RATHER THAN THE RULE.

H.R. 5825 would radically amend the definition of "electronic surveillance" to eliminate surveillance of many communications of individuals in the United States from the protections of the Act. It would radically rewrite the provision giving the Attorney General authority to conduct warrantless surveillance of foreign embassies in order to allow warrantless surveillance of millions of individuals in the US. It would provide for unlimited and unchecked warrantless surveillance and secret physical searches after attacks on the United States. Finally, it would also eliminate the requirement that the government obtain a FISA court order before using pen register or trap and trace devices to capture real-time call information showing what numbers or addresses were called. It would allow the government to capture such information about virtually everyone in the US and use it to map their associations and contacts.

4. THE WARRANTLESS SURVEILLANCE THAT WOULD BE AUTHORIZED BY H.R. 5825 FUNDAMENTALLY VIOLATES THE FOURTH AMENDMENT.

While the President has claimed "inherent authority" to violate the existing prohibitions in FISA on warrantless surveillance, eliminating those statutory prohibitions will not cure the constitutional infirmity of such surveillance. The Fourth Amendment is clear that a judicial warrant is required for interception of Americans' communications and that such warrant must be based on individualized probable cause of wrong-doing. Such protections are of course even more critical, where as in the case of FISA surveillance, the individuals surveilled are likely never to know that the government has taped their telephone calls, e-mails, private conversations or searched their houses and copied the contents of their computer hard drives and photographed their papers.

While the administration argues that surveillance is necessary to counter the threat from Al Qaeda, a claim with which we agree, it makes no showing why such surveillance need be conducted without a judicial warrant. Again, such a warrant is especially crucial, where there is unlikely to be any after-the-fact judicial review of the surveillance because it will be kept secret. The Department of Justice cites Courts of Appeals cases upholding warrantless surveillance, but all of those cases dealt with pre-FISA surveillance. See *United States v. Truong*, 629 F.2d 908, 916 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). And in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), a plurality of the D.C. Circuit rejected the notion that electronic surveillance for foreign intelligence activities can be conducted without a warrant.

With the establishment of the FISA court and FISA's provisions for secret warrant application procedures and permanent secrecy, the rationale for allowing warrantless searches disappeared. Moreover, even the pre-FISA cases upholding

warrantless surveillance did so only when the Attorney General had personally determined that there was probable cause that the target of the surveillance was an agent of a foreign power. See *United States v. Truong*, 629 F.2d 908, 916 (4th Cir. 1980). Where that determination had not been made by the Attorney General, the surveillance was held unconstitutional and the court suppressed evidence from a search that had not been so approved. In the case of the Terrorist Surveillance Program, the Attorney General has made no such determination. Likewise, H.R. 5825 would authorize massive surveillance with no warrant and not even any individualized determination of probable cause by the Attorney General.

The NSA claims that the program is constitutional, because there is oversight through its Inspector General's office and notification to members of the Intelligence Committees. But the Fourth Amendment's requirements of probable cause and judicial approval are not optional protections to be replaced by Executive Branch procedures at the Executive Branch's option. The essence of the constitutional protection for individual liberties is the division of powers among all three branches of government, so that all power over an individual would not be concentrated in the hands of the Executive Branch. The requirement of probable cause for government intrusions into individual liberty found in the Bill of Rights may not be superceded by rules promulgated by the administration of the day. H.R. 5825 seeks to do away with these bedrock constitutional protections.

Mr. LUNGREN. Mr. Fein, please.

**TESTIMONY OF BRUCE FEIN, PRINCIPAL,
BRUCE FEIN & ASSOCIATES**

Mr. FEIN. Mr. Chairman and Members of the Committee, I am honored to testify here today.

You mentioned at the outset, Mr. Chairman, the devastations of 9/11. And I think the proponents of the legislation today, representing the Justice Department, urge that we be alert to the need to defend ourselves against the al-Qaeda and other international terrorists that have no ground rules that would shield any of us from potential attack. But there is also, I think, something to be learned from a similar attack, December 7, 1941, Pearl Harbor.

In the aftermath of that devastation, which was then, I think, the most damaging to the United States, there was undertaken in response to the alarm the internment of 120,000 Japanese Americans, all of them loyal, based upon nothing but fear and bigotry against persons of Japanese ancestry. It was an act that was ultimately apologized for by this Congress in the Civil Liberties Act of 1988.

Now, I just suggest that analogy to remind the Committee that the executive branch can sometimes get it wrong, that unchecked power is inviting abuse.

It can be said that today we don't have any clear evidence that the warrantless surveillance program of the NSA has produced anything like the massive violations of civil liberties after Pearl Harbor. But you all remember that the Church committee hearings in the 1970's revealed undisclosed, massive violations, that had been persistent for 20 years, by the FBI and the CIA intercepting international telegraphs, misuse of the NSA in diverting their mission from intelligence collection to law enforcement that had been concealed and unknown for decades.

Just because we don't know there are abuses that are on the front pages of the *New York Times* and *Washington Post* doesn't assure us that they aren't ongoing; you don't know what is being done with the information collected, what the minimization proce-

dures are. And I simply alert this Committee of these possible dangers to suggest that the Administration must shoulder, in my judgment, a very strong burden to suggest that we need extraordinary measures that depart from the customary rules that we have operated under with the Foreign Intelligence Surveillance Act ever since 1978.

That is a long period of time. Over 30 years.

The Wilson bill that you are examining today is tantamount to a repeal of FISA because of the exemptions of the warrant requirement every time the President certifies that there has been an attack, a terrorist attack, against the United States.

Now, I would suggest, Mr. Chairman and Members, there will not be a day from now for at least 10 years where one of our soldiers in Iraq or Afghanistan or elsewhere around the world will not be the target of a terrorist attack. It occurs every day, and the President simply makes that certification every 45 days and the warrant requirement is ended. It is the equivalent of ratifying the President's warrantless surveillance program that obtains at present.

There is another element of the Administration's testimony that seems to me worrisome. As you well know, in earlier rounds that the Congress has held the Administration has taken the position that article 2 of the Constitution empowers the President to conduct a program irrespective of any statute that Congress enacts, including the Wilson bill. That particular theory of constitutional power has not been repudiated by the Administration before this Committee or any other. The gist of their position then is whether or not this Committee enacts the law. It doesn't have to obey it anyway because its article 2 power supersedes whatever Congress can do.

It seems to me, therefore, it would be grossly remiss for this Committee not to inject in any bill that regulates foreign intelligence collection a clear assertion that Congress does enjoy power under the necessary and proper clause to regulate—not eliminate, but to regulate—the President's authority to gather foreign intelligence.

Now let me quickly turn to the burden that the Administration says has been satisfied to show why we need to abandon the Foreign Intelligence Surveillance Act. It simply says, well, it doesn't do the job without giving any particular reasons. As recently as July 31, 2002, this same Justice Department told the Senate Intelligence Committee that FISA as amended by the PATRIOT Act and other statutes was nimble, flexible and didn't need any reform. Indeed, the Department opposed a relaxation of FISA, saying it would create constitutional problems in addressing a proposal by Senator Mike DeWine.

Now, there has been no indication since July 31, 2002, in any public statements by the Administration, that anything has changed with regard to the operation of FISA. It seems to me obligatory on the Administration to show with specifics—it can be done in executive session or otherwise—that the warrantless surveillance program for 5 years has been able to gather critical intelligence that could not have been gathered under FISA; not only

that, that it could not have in a secret session proposed amendments to FISA to address any shortcomings.

In my judgment, the most dangerous element of this whole exercise is this insistence by the Administration that checks and balances can be abandoned, that we can simply resort to single executive branch Government in the war against international terrorism because there is fear out there that can be exploited politically to suggest anyone who would want any regulation that is weak on terrorists.

That would set a precedent, as Justice Robert Jackson once said, that lies around like a loaded weapon ready to be used by any other future President who wants to violate a congressional statute. If there comes a sequel of 9/11 that happens here, the fear and alarm that will be created will invite a President to do just that.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN

Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to testify in opposition to H.R. 5825, a bill that would emasculate the scope and checks and balances of the Foreign Intelligence Surveillance Act of 1978 (FISA) without any benefit to the national security.

The Bush administration has made no showing that FISA is deficient in gathering foreign intelligence to defeat international terrorism. Indeed, on July 31, 2002, Bush's Justice Department effused to the Senate Intelligence Committee that FISA was nimble, flexible, and optimal in thwarting terrorism in the bud. Neither the Bush administration nor the 9/11 Commission has adduced any evidence that 9/11 might have been foiled if the President had then enjoyed unfettered power to spy on American citizens on American soil. And during the five years since President Bush's commenced the National Security Agency's warrantless domestic surveillance program in violation of FISA, no convincing evidence has been forthcoming that a single terrorist plot or incident was foiled but would have succeeded if FISA had been followed.

Moreover, President Bush has continued to conceal from Congress intelligence programs that have not been leaked to the media. It would be irresponsible for Congress to legislate in an ocean of ignorance. Further, H.R. 5825 neglects to challenge President Bush's claim that he is crowned with inherent Article II authority to ignore any law enacted by Congress that purports to restrict in any way his ability to collect foreign intelligence, including restrictions on mail openings, breaking and entering homes, electronic surveillance, or torture. If Congress accepts that White House claim, then any FISA legislation, including H.R. 5825, will be meaningless.

In lieu of H.R. 5825, Congress should prohibit the President from expending any monies of the United States to gather foreign intelligence except in conformity with FISA. Brandishing the power of the purse will concentrate the mind of President Bush wonderfully on disclosing to Congress facts and reasons that might demonstrate a genuine need to amend FISA for national security purposes as opposed to political optics in anticipation of November's elections.

I. BACKGROUND

The history of unchecked power is a history of abuses and tyranny. Unchecked power occasioned the Magna Charta, the English Bill of Rights of 1688, the Declaration of Independence, the United States Constitution, and the Bill of Rights. The crown jewel of the Constitution—the separation of powers—confirms the Founding Fathers' belief, like Lord Acton, that power corrupts, and absolute power corrupts absolutely.

That conviction has been corroborated by the history of unchecked domestic and foreign intelligence spying by the President as disclosed by the Church Committee and sister congressional committees: two decades of illegal mail openings by the FBI and CIA; two decades of illegal interceptions of international telegrams by the twin spy agencies; seven years of misuse of the NSA for non-intelligence gathering purposes; COINTELPRO; OPERATION CHAOS; massive files on political dissidents. Nothing is more common in the history of spying than the ready conflation of polit-

ical opposition with subversion or treason, and government attempts to suppress dissent by generating an aura of intimidation or fear of retaliation.

FISA provided a measured response to the alarming abuses of unchecked spying by the executive branch. Its constitutionality was incontestable. FISA accepts that the President enjoys inherent power to gather foreign intelligence. But Article I, section 8, clause 18 entrusts Congress with authority to regulate any power conferred on any branch of government—legislative, executive, or judicial. FISA circumspectly regulated the NSA’s authority to target American citizens on American soil who were suspected of terrorist activities. But the statute by no means either eliminated or crippled the President’s power to gather foreign intelligence. Indeed, FISA leaves all but a crumb of foreign intelligence collection outside its ambit.

As Mr. Robert Deitz, General Counsel of the NSA, testified on September 6, 2006: “[B]y far the bulk of the NSA’s surveillance activities take place overseas, and these activities are directed entirely at foreign countries and foreign persons within those countries. All concerned agree, and to my knowledge have always agreed, that the FISA does not and should not apply to such activities In addition, even as it engages in its overseas mission, in the course of targeting the communications of foreign persons overseas, NSA will sometimes encounter information to, from or about U.S. persons. Yet this fact does not, in itself, cause the FISA to apply to NSA’s overseas intelligence activities, and to my knowledge no serious argument exists that it should.” In other words, President Bush’s signature hypothetical misrepresents FISA. If Al Qaeda is calling from abroad and an American picks up the phone in the United States, FISA does not require the NSA to stop listening.

Generally speaking, FISA applies only to that sliver of the NSA’s foreign intelligence activities that target American citizens on American soil. FISA does not prohibit such targeting, but simply requires the Attorney General to obtain a warrant from a FISA judge based on probable cause to believe the American citizen is a lone terrorist or acting as an agent for a foreign power or foreign terrorist organization. The warrant threshold is not troublesome. Since the enactment of FISA, approximately 20,000 warrants have been sought and all but a handful approved. Further, FISA provides a 15 day window for spying without a warrant in the aftermath of war and a 72 hour window in cases of emergencies. No evidence has been adducted indicating that in countries like Great Britain or France whose intelligence agencies are unrestricted by an equivalent of FISA are any safer or superior in foreign intelligence collection than is the United States. In sum, it would be preposterous to assert that FISA unconstitutionally compromises the President’s ability to collect foreign intelligence and protect national security.

II. NO NEED TO FURTHER AMEND FISA

FISA has been amended several times since 9/11, for example, to tear down the wall between intelligence and law enforcement, to extend the emergency exception to 72 hours, and to bring lone wolf terrorists within its scope. It speaks volumes that H.R. 5825 is naked of even one finding suggesting a need for additional amendments. In other words, the bill’s sponsors have been unable to articulate any deficiencies in the existing statute.

III. H.R. 5825 EFFECTIVELY REPEALS FISA

As a practical matter, Section 8 of H.R. 5825 repeals FISA and endows the President with virtually untrammelled power to intercept the communications of every American on his say-so alone. Section 8 eliminates FISA’s warrant requirement for electronic surveillance whenever the President certifies that the United States has been the subject of a terrorist attack, and, identifies the terrorist organizations or their affiliates believed to be responsible. But for the indefinite future, the United States will daily be targeted by terrorists in Iraq and Afghanistan. Indeed, some American will be targeted by some terrorist somewhere in the world every day for the foreseeable future. Section 8 stipulates that the persons targeted by the warrantless electronic surveillance should be reasonably suspected of communicating with the responsible terrorist organization. But the executive branch will invariably find that its own suspicions meet that benchmark. For example, during the five years of the NSA’s warrantless domestic surveillance program there is no evidence that any supervisor at the NSA or Department of Justice prevented a single electronic surveillance because of too weak a suspicion that the target was implicated in terrorism.

H.R. 5825’s attempt to limit spying on Americans is toothless. It declares that warrantless electronic surveillance must cease after 90 days unless a four-fold presidential certification is made to Congress. The certification can be easily satisfied: that the surveillance is vital to national security; that it is too difficult or burden-

some to seek a FISA warrant; the facts justifying the belief that the target is implicated in terrorism; and, the foreign intelligence collected by the warrantless surveillance.

Other provisions in H.R. 5825 are troublesome, for example, relaxing minimization requirements and exempting emails almost entirely from FISA's reach. But they pale in comparison to the evisceration of FISA under the "terrorist attack" exception.

IV. WHY SHOULD CONGRESS CARE?

Congress might ask why it should be worrisome that the President be given unchecked power to spy. A common refrain is that if you have nothing to hide you should welcome government spying on yourself.

The answer is that the right to be left alone from government intermeddling is the one most cherished among civilized men, as Justice Louis Brandeis lectured in *Olmstead v. United States* (1928). Unchecked government spying leads to abuses. Non-public information is gathered and disclosed to embarrass or to destroy political opponents or personal enemies. Just ask Ambassador Joseph Wilson and Valerie Plame. And think of Dr. Martin Luther King. Further, the fear of ubiquitous government spying encourages citizen docility and discourages dissent or criticism to avoid the potential of government retaliation. An inert people are the death knell of democracy.

V. WHAT CONGRESS SHOULD KNOW

Before Congress contemplates further amending FISA, it should demand to know the following from the President in executive session or otherwise:

1. A description of every foreign intelligence program operating outside of FISA.
2. With regard to each program identified in response to paragraph 1, the number of Americans targeted, the selection criteria for the targeting, whether criticism of President Bush is a factor in targeting decisions, who makes the targeting decisions, the internal review process of the targeting decisions, a description of the instances where spying on a proposed target was denied, the performance standards used to evaluate the officials who select the targets, the Fourth Amendment training received by the officials who choose the targets, the foreign intelligence gained that could not have been acquired through FISA, minimization procedures for destroying non-foreign intelligence information, the usefulness of the foreign intelligence obtained compared with the usefulness of foreign intelligence assembled under FISA, a listing of the terrorist plots that have been foiled since 9/11 or terrorists captured in which foreign intelligence gathered in violation of FISA played a material role and could not have been gathered in compliance with FISA.

As President Woodrow Wilson remarked, the informing function of Congress is its most important. But Congress has been grossly derelict in informing itself and the public about President Bush's multiplicity of foreign intelligence collection enterprises. The power of the purse is readily available to cure the dereliction: no information, no money. It has sat dormant for too long.

Mr. LUNGREN. Thank you very much, Mr. Fein. And we will begin round of questioning 5 minutes apiece.

Mr. Fein, I always enjoy your testimony. You always make references to historical facts. I happen to have been the Vice Chairman of the Commission that looked at the treatment of Japanese Americans and Japanese nationals back in the 1980's and made the recommendation for an apology.

One of the historical facts we unearthed was that of all the top people in Government, there was only one notable who did not support the President's Executive order which resulted in the rounding up of loyal Americans who happened to be of Japanese descent, and that was J. Edgar Hoover. And J. Edgar Hoover did it based on the fact that he believed he had gathered sufficient intelligence to determine those for whom we had probable cause, who might be disloyal to the United States, and he felt that we didn't need to round up everybody, just those for whom there was probable cause.

In that case, it was the intelligence that had been gathered by the FBI that would have preserved the privacy rights of most Japa-

nese Americans, interestingly enough. Also the only place where his suggestion was carried out happened to be in Hawaii because they believed that if they rounded everybody up of Japanese descent or nationality in Hawaii they wouldn't have had a sufficient workforce.

And his approach actually worked; and there is an interesting point that you had brought up where gathering of sufficient intelligence actually preserved civil liberties in this country as opposed to limiting them.

Mr. Eisenberg, you said in your statement that one of the reasons the Administration is proposing this legislation, or proposing a fix and at least looking positively upon major elements of the Wilson bill, is that the executive branch is overly burdened at the present time; and I think those were your words, "overly burdened" in obtaining this information.

When you are dealing with a question of civil liberties, when you are dealing with a question of the rights of American citizens, that probably doesn't sound sufficient to support legislation; and so I know you can elaborate on that, if called upon. I wish you would.

Mr. EISENBERG. Yes, thank you for the opportunity.

Currently, FISA applications call for, in many cases, a lot of information that has very little to do with anything that could be protective of civil liberties. Burdens like that don't have anything to do with protecting civil liberties. So to the extent that we can streamline the application process, that would remove a burden from the executive branch that would do nothing at all to civil liberties; in fact, it would protect civil liberties.

In addition, to the extent that we can refocus the definition of electronic surveillance so that it depends basically on targeting individuals inside the United States who have fourth amendment rights, that allows the executive branch and the FISA court to focus those resources on those with fourth amendment interests; and then, as you just pointed out, sometimes adequate intelligence protects civil liberties for other reasons as well.

Mr. LUNGREN. I would like to ask, Ms. Martin and Mr. Fein. And that is, would you object to a bill that would be technology neutral with respect to the ability of the NSA to operate in gathering information as it was done, let's say, prior to the 1980's when we had this expansion or explosion of technology advances?

In other words, one of the arguments made by the Administration, specifically by NSA and the Justice Department, is that a fix is necessary because the definitions it obtained at that time did not anticipate the technology advances that we had; and what we have now is have some hampering of the ability of the executive branch to gather that information which was intended to be available to them at the time that FISA was passed, but because of new technology, actually either prevents it or, in many ways, places what would be considered undue burden on them without any requisite protection of civil liberties.

Ms. Martin and then Mr. Fein.

Ms. MARTIN. Well, with all due respect, I am skeptical of the framing of the argument by the Government. What I understand is that while there are some exceptions to the warrant requirement written into the FISA, that it was always understood that the

fourth amendment applied and protected individuals inside the United States when the Government sought to listen to their conversations, and that if a FISA warrant wasn't required in certain circumstances, for example, what was required at a minimum was a determination by the Attorney General that the person who was going to be listened to was suspected of being an agent of a foreign power, that there was some probable cause as to that individual, and that that probable cause determination was made by the Attorney General.

I think that the issue before the Committee is not adequately analyzed in terms of technology neutrality and what happened then and what is happening now. I think the issue that you have to ask is, do the fourth amendment warrant requirement and particularity requirement apply when the Government listens to conversations of people in the United States, and if so—and I submit that it does—are there some insurmountable barriers to assist them where the FISA court issues a secret warrant authorizing that kind of surveillance based on an individualized determination of probable cause? And I don't think they have made that case.

Mr. LUNGREN. Mr. Fein, my time is up, but if you could just briefly.

Mr. FEIN. I think the standard can be technology neutral by referring to the fourth amendment standard of the Supreme Court which is incorporated in two of the three definitions of electronic surveillance and FISA, namely, a reasonable expectation of privacy. That is what triggers the protection of the fourth amendment and triggers worries when there is not a warrant.

So if you want to amend FISA to say, through whatever technology, when an American has a reasonable expectation of privacy in his conversations, they need a warrant, but when there is not a reasonable expectation of privacy, a warrant is not required, I think that is fully satisfactory.

If I can amplify on the Pearl Harbor incident, what I think your example shows is the worry that politics will enter into the decision of how intelligence is used and result in abuse. Because J. Edgar Hoover's view didn't result in the protection of a civil liberty of any of those 120,000 Japanese Americans, who stayed there well after 1944, again for political reasons, so November elections wouldn't disturb the Democrats.

Mr. LUNGREN. A historical argument for J Edgar Hoover not being political.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Eisenberg, Mr. Potenza, Mr. Deitz would not tell us what the NSA wiretap program was in any detail. Could you tell us exactly what you are doing with that program? We have had little bits and pieces come out through the New York Times.

We are changing the law to accommodate what you are doing. We would like to know what we are accommodating.

Mr. EISENBERG. We actually cannot discuss the operational details of the terrorist surveillance program, but I think that there is enough on the public record. We have provided a 42-page paper.

Mr. SCOTT. Wait a minute. You mean enough has leaked out?

Mr. EISENBERG. No. The Department of Justice has set forth a 42-page legal defense of the terrorist surveillance program on the assumption that FISA applies to it; and I think that the Committee can use that to the extent it needs to worry about the terrorist surveillance program.

Mr. POTENZA. If I may, I would just add to that that the other thing that is clear on the public record is that it is a narrowly focused program. It is not a vacuum cleaner.

I think General Hayden testified on the public record that it is not a drift net, that it is focused to accomplish a very specific purpose, and that is to detect and prevent additional terrorist activities in the homeland.

Mr. SCOTT. Well, you know, you just kind of draw those conclusions: You are fighting terrorism; therefore, we ought to accept everything we do. That is not consistent with our checks and balances.

Let me ask you a couple of specific questions. If someone in a foreign country is calling someone in another foreign country, is that conversation subject to fourth amendment, entitled to fourth amendment protections in terms of search and seizure?

Mr. POTENZA. A foreigner calling to a foreigner in a foreign country does not have fourth amendment protection.

Mr. SCOTT. What about the foreign target generally? If you have identified someone in a foreign country, do they enjoy forth amendment protections?

Mr. POTENZA. I would think not.

Mr. SCOTT. Now, Ms. Martin has indicated that there is language that allows this vacuum cleaner.

Ms. Martin you want to point to the language in the bill that allows that?

Ms. MARTIN. Yes, sir.

The revision of the definition of electronic surveillance, which is contained on page 2 in the new (f)(1), makes the intentional collection of information relating to a particular person electronic surveillance, and therefore, subject to the FISA warrant requirements.

But if you are simply acquiring contents of a communication where one person is in the United States and one person is overseas, now if you look at f(2), that does not come within the protection of the FISA warrant requirement.

Mr. SCOTT. If both are in the United States, you have to get a warrant, but if one is not in the United States and one is, then you are back into (f)(1) where nothing is covered.

Mr. Eisenberg, Mr. Potenza, do you want to comment on that?

Mr. EISENBERG. Could I actually respond to that?

Mr. SCOTT. Wait a minute. Have you said all that they need to respond to?

Ms. MARTIN. I just want to be clear that when it is not covered is if what they did was—instead of targeting an individual talking overseas that they seized a whole set of communications, say, between one locality and another, one locality in the United States and a locality overseas. I don't see that as covered by these definitions.

Mr. SCOTT. And then once you have that information you certainly have it and can listen into it; is that not right, Mr. Eisenberg?

Mr. EISENBERG. I take it with the premise I actually think (f)(1) in the Wilson bill would be satisfied by such a collection, because I think it would be very difficult for us to say we are not intentionally targeting a specific person when we are essentially targeting 270,000,000 people.

Mr. SCOTT. Can we make that clear? Would it offend your sensibilities if we made it clear that any installation or use of a device to intentionally collect information was reasonably believed of anybody or any group of people reasonably believed to be in the United States?

Mr. EISENBERG. I think it is clear in this definition and by the definition of "group" in FISA, as well, as "person."

Mr. SCOTT. Okay.

Mr. FEIN. I would like to add the reason why I think, Congressman, that clarification is needed, because at least on the Senate side in debating this issue, it is precisely this authorization of a blanket warrant that is being considered to be given to the President to obtain a warrant says, as long as you have a program that collects conversations from everybody in the United States and not picking any particular person out for surveillance, then that satisfies the statute in the fourth amendment.

That is why this isn't simply an academic point; it is very much the provision in the Senate bill sponsored by Cheney and Specter, and it ought to be clarified in the House. If it is not endorsing, that concept repudiates it.

Mr. LUNGREN. Thank you.

Gentleman from Arizona, Mr. Flake, is recognized for 5 minutes.

Mr. FLAKE. Thank the Chairman and the witnesses.

I want to get to something I asked in the last hearing and I don't think I ever got a firm answer for it. It touches on something that Mr. Fein raised, that we are going through this exercise with the markup of the Wilson bill, but it hasn't been made clear to me what we will actually accomplish in the end.

In the end, by amending FISA, by streamlining it, by expanding it, by giving the President authorization to do more than he could otherwise, are we replacing the TSP? Or will the TSP run parallel to the new authorized provisions of FISA?

Mr. Eisenberg, can you clarify?

Mr. EISENBERG. I think we should just view TSP as separate from Wilson, but I will say that from the 42-page paper that I described earlier, on the assumption that the TSP involves electronic surveillance, that the one-end foreign communications would not constitute electronic surveillance where you are targeting the terrorist suspect overseas. So even on the assumption that it is electronic surveillance, the need for TSP would be reduced.

Mr. FLAKE. Reduced, but still there?

Mr. EISENBERG. That is not for me to say.

Mr. FLAKE. So what have we gained in terms of the Congress, the first branch of Government, in terms of oversight? Have we gained anything? And because if it becomes too difficult under the

streamlined provisions of FISA, does it just get kicked over to the TSP?

Mr. EISENBERG. As Mr. Potenza made clear, the terrorist surveillance program is an exceptionally narrowly focused program that depends on the fact that we are in a state of armed conflict with al-Qaeda and that the Congress authorized the use of military force against al-Qaeda. So this bill would seek to reframe FISA across the entirety of foreign intelligence collection and not just with al-Qaeda.

Mr. FLAKE. With all due respect, that very narrow application becomes as broad as you want to make it if there is a declaration of armed attack. Or, really, we don't know because we can't be briefed on it here; and so that is—I just want to explain again the difficulty we are in in the Judiciary Committee in trying to mark up corrections or streamlining of FISA when there is always something else you can go to, and we will not know whether that program is being used or not. It is really difficult.

Mr. Fein.

Mr. FEIN. Yes, I think that what needs to be done if you want to force the Administration's hand is, put in explicitly what was done in the 1978 Foreign Intelligence Surveillance Act; if the Heather Wilson bill passes, that it shall be the exclusive means, exclusive of any article 2 authority of the President or otherwise, to conduct foreign intelligence collection.

And I would wager, Mr. Congressman, if you put that in, the Administration would oppose it and veto it or issue a signing statement saying we don't have to comply.

Mr. FLAKE. You suggested language earlier, something to the effect that Congress retains the authority to regulate the President's authority to obtain intelligence.

Mr. Eisenberg, would the Administration oppose that language?

Mr. EISENBERG. I think that in the context of an armed conflict we're all better served where the branches work together. I would note that the court of review, the very court that Congress set up to oversee the FISA process, recently explained that FISA, or any statute, could not encroach on the President's constitutional authority.

Mr. FLAKE. Ms. Martin, do you have any comment?

Ms. MARTIN. Well, I agree that this is a very important issue, and I think that the question is, what is the point of Congress legislating here if, one, it has not been fully briefed; and two, the President won't promise to follow the law even when it has been amended?

And on the question of being fully briefed, I'd just like to say that, you know, we supported the creation of the Intelligence Committees to act as a proxy for the American people to conduct oversight of activities that have to be secret. But when you are talking about amending the fundamental law that protects the fundamental fourth amendment rights of American people, I think that the Congress has the responsibility to make a public record about what the changes mean and why the changes are necessary.

And I think that if you go back and look both at the Church committee report, but more importantly, at the hearings and the record that was made about FISA, that we can have many more facts on

the public record without interfering with any national security issues.

We are not asking to know who was the target of the terrorist surveillance program. But I have yet to hear any justification for the Administration refusing to tell the American people, for example, are you going outside the pen register and trap and trace provisions of the FISA, and getting addressing information on hundreds of thousands of phone calls in order, you know, to draw a map or to do traffic survey?

What is the justification for not telling the American people that and simply asking the Congress to authorize them to do that without any court order?

Mr. FLAKE. I thank the Chair.

Mr. LUNGREN. Time of the gentleman has expired.

Gentleman from Michigan and the Ranking Member of the full Committee is recognized for 5 minutes.

Mr. CONYERS. Thank you, Chairman Lungren. I appreciate this hearing. The only thing I can conclude is that we need more of them to get to where we are going.

Mr. Potenza, do you concede that we are basically altering the framework of FISA under the proposals in the Wilson bill?

Mr. POTENZA. I don't think we are. Our view is that the proposals on the table focus FISA on its original intent, that is, to protect persons in the United States and to protect communications both ends of which are in the United States. And that is what the redefinition of electronic surveillance in our view intends to achieve.

Mr. CONYERS. Do you think that there is at least a question of fourth amendment violations inside the Wilson bill?

Mr. POTENZA. No, sir.

Mr. CONYERS. Well, we have never had quite as diametrically opposed views by excellent lawyers in this panel in the history of the Judiciary Committee.

Let me ask the same question, first of Mr. Fein and then of Ms. Martin.

Mr. FEIN. Well, I certainly think there are egregious fourth amendment violations in the bill because it empowers the President to discard every kind of protection against abuse of investigative authority every time he announces, on his say-so alone, that there has been a terrorist attack against the United States, which is going to occur. In Iraq or Afghanistan, in our lifetimes or thereafter, there is always going to be there the enemy, some remnant of al-Qaeda wanting to attack us. And that, under the statute, suspends the fourth amendment and any limitations.

I know of nothing in any Supreme Court decision, including the Keith case, concerning domestic surveillance that suggests that the fourth amendment vanishes every time the President says a terrorist attacked one of our troops in Baghdad, which is what this does.

Mr. CONYERS. Let me get her first.

Did you want to come in, Mr. Eisenberg?

Mr. EISENBERG. I want to say that removing something from the coverage of FISA removes the requirement that you get a court

order, and the Supreme Court has long made clear that a court order is not always necessary.

There are special needs beyond the ordinary law enforcement where the test of fourth amendment is merely reasonableness; and we think that foreign intelligence surveillance, especially in the midst of an ongoing armed conflict, is certainly a special need.

Ms. MARTIN. That actually leads to my point, which is that I think we are hearing—for the first time, perhaps—a very radical view from the Justice Department, which is that Americans' communications aren't entitled to any protection under the warrant clause unless you are calling somebody else inside the United States.

As I understand, what they are saying is that every time they call overseas you don't need a warrant because that wasn't the original intent of FISA.

I disagree with that reading of either the legislative history or the legislative text, but most of all, I know of no fourth amendment authority that says you can listen to an American's telephone calls when they call England, without a warrant. And that is what I hear the Justice Department arguing.

Mr. FEIN. And if I could add, Mr. Congressman, the reason why the statute here is so pernicious is because it lends congressional authority to whatever inherent Presidential power there is to gather foreign intelligence after a clash with international terrorism. And as you all know—and I know the chairman of Youngstown Sheet & Tube says that the President's authority is at its zenith when Congress has specifically endorsed what he is doing without a warrant; and that is why this legislation, if it was enacted, would mean that the Presidential authority to gather foreign intelligence without a warrant is much lower, a low watermark, which would make it highly dubious.

Mr. CONYERS. I think what we may be doing is a couple of things.

First of all, we are rationalizing the President's and the NSA's activities and conduct, and we are simply making it okay, at least until it gets into the court to be tested. And so that leaves me quite disturbed. This is a sort of a fix-it approach.

The second thing in the time remaining, I would like Martin and Fein to talk about the fact that this bill doesn't—the Wilson bill doesn't speak to the alleged problems that are being complained of. I mean, it is like we are going to get a secret operation from—can I get one-half minute more, Mr. Chairman?

Mr. LUNGREN. Certainly.

Mr. CONYERS. Just so that you don't pick up that gavel as I thought I saw you reaching for.

It looks like we are fixing—we are making it clear that the President can do this, and it doesn't meet the problems. We may be besieged in the Rules Committee with a new bill that comes in with all kinds of new things, and that was my big disappointment in the PATRIOT bill.

Could you comment on that very briefly?

Mr. FEIN. I think, Mr. Conyers, what you pointed out is, there are some small problems that exist with regard to FISA.

For example, the accident that a transit of a communication between two foreigners in the United States is covered, that could be fixed with minor changes; and they have used that as an excuse to basically repeal the whole statute by giving the President unfettered authority as long as there is a conflict with international terrorism to ignore FISA.

If you want to have these small fixes—and maybe 5 days is better than 3 days for an emergency warrant—you can have that in stand-alone bills. But this particular Wilson bill as the exception gobbles up the entire statute and really makes the technical fixes irrelevant in anything.

Mr. LUNGREN. The gentleman's extra half-minute has long expired.

Mr. CONYERS. I thank the Chairman and the witnesses.

Mr. LUNGREN. Gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. I thank the distinguished Chairman and I thank the witnesses.

We are in a dilemma, caught between the seriousness that I believe each of you is concerned with, which is the securing of America. And my line of questioning will pointedly try to break the schism that seems to taint those of us who are concerned about civil liberties in the Constitution as well.

The take on this hearing will be that a particular view, of course, will undermine the securing of America, and I think that is the misrepresentation that blankets a reasonable discussion on this issue. And I think my distinguished Ranking Member has made a very valid point, along with the Ranking Member of the full Committee, Ranking Member of the Subcommittee. We need more time because the headlines or the political headlines that will carry the day, the election day, will be this schism or this divide between those of us who raise this point.

So I am going to try to pull you out of the ashes and, of course, you say you're not there. But it is how it is interpreted.

The other point that I want to make very clear is that we wrote right after 9/11 a bipartisan PATRIOT Act. I think many of you might have been engaged in that review from both sides of the aisle, and, of course, prospectives, political conservatives and liberals. Unfortunately it was derailed. And I think it's important for the American people to know that we can secure the homeland as Americans. And frankly, I think it's unfortunate that we have a bill that is a political bill. It is a bill of someone who is in a contested election. I don't know where it's coming from. The Administration hasn't suggested they're supporting it, and frankly, this is not the way to write legislation that really is going to be the cornerstone of America's security and survival over the decades.²¹ So I do want to raise to both Mr. Eisenberg and Mr. Potenza and Ms. Martin and Mr. Fein the question again about how the Wilson Bill protects U.S. citizens from unreasonable search or seizure, for Mr. Eisenberg and Mr. Potenza. And how, for Ms. Martin and Mr. Fein, again, though it may have been crafted another way, how it interferes.

And for Ms. Martin and Mr. Fein, and I'm going to ask, if you would, engage in the rebuttal that questioning this approach is un-

patriotic or undermines the Nation's ability to secure itself, because I think any one of us that are sitting across this table would be the first in front, along with our fellow Americans, to defend this Nation. But that is not the interpretation that is given.

And the last point of my questions is that, Mr. Fein, you have made a very good metaphor, analogy about the fact that an attack in Iraq could be interpreted as such. And I was listening, and so I went to section 112, and I think this is the language, and you're right. It's not now. It does not make a specific definition to suggest that the President would be talking about on our soil. Maybe that's what we need to talk about. Because in actuality, I wonder whether the British find with the individuals with the liquids could be considered a potential attack because they were entering the United States.

So people are going to be concerned. Listen to these folks who are sitting here. They are not concerned about securing America. You know, we give away our rights. We only worry about that when we are indicted, but I ask quickly for Eisenberg and Mr. Potenza to answer me how the Wilson Bill protects. And quickly, I would like to ask the Chairman's indulgence so that Ms. Martin and Mr. Fein can answer the last two questions. Mr. Eisenberg, Mr. Potenza, how did it protect?

Mr. EISENBERG. I would like to distinguish between the first two aspects of the Bill. The first is the sort of FISA modernization and the second is the programmatic issue. I'm going to focus my remarks—

Ms. JACKSON LEE. Just because I am under the gun specifically, I need you to just answer that question, how does it protect citizens from unreasonable search and seizure? And if I had more time—

Mr. EISENBERG. Electronic surveillance would focus on U.S. persons, on people in the United States who have constitutional rights. That's how it would protect U.S. person rights. That would be the entire focus of the bill. We would take resources away from focusing on situations in which U.S. person rights, some people in the United States are not at stake and devote those resources and the attention of the FISA court to those situations that most directly implicate the rights of U.S. persons.

Ms. JACKSON LEE. Mr. Potenza?

Mr. POTENZA. Yes, ma'am. By focusing on the target, by causing the focus on the target of the collection, it puts us in a posture where we are today and many of our other collection sources where we protect U.S. citizens' rights, because we apply reasonableness standards, which is regulated by the executive branch minimization procedures that have been filed with and reviewed by the intelligence committees and subject to Intelligence Committee oversight. So focusing on the target protects U.S. persons' rights.

Ms. JACKSON LEE. Ms. Martin and Mr. Fein.

Ms. MARTIN. Well, I want to say that I think that the framework of FISA has served our national security interests superbly. And it does it by focussing the limited counterterrorism resources that are available and forcing the intelligence community to make a determination before it surveils somebody that there is some good reason to surveil that person. Because every time they do a surveillance, it means they are not doing something else, and that the

whole purpose of FISA is to say, look at the people who you have some basis to suspect are being terrorists, and that's what's being deleted from here. It has also served national security interests very well because the people charged with carrying out FISA have been secure, that they do not face any personal liability for eavesdropping. And if I could just add one final sentence.

Ms. JACKSON LEE. Well, I want to get to Mr. Fein.

Mr. LUNGREN. Well, the gentlelady's time was expired almost 2 minutes ago, and I have other Members who want to talk. So if Mr. Fein could just shortly respond.

Ms. JACKSON LEE. Thank you, Ms. Martin.

Mr. FEIN. Civil liberties aren't protected at all, because you will notice the Administration still has not repudiated to you, indicated, nor everything in the bill anyway because there's inherent article 2 power to surveil without any warrants because we're in a class with international terrorism. Whether they call it narrow exception or broad exception, it's as wide as the President makes it.

Now, with regard to how we characterize our defense of FISA, as protecting national security, I recall a statement by Justice Robert Jackson saying, checks and balances don't make for weak Government. They increase Government strength because it makes citizens confident that the Government is performing according to the rules and makes them more willing to yield liberties because they know their checks and balances. And that shows, in my judgment, that following FISA will strengthen rather than weaken the Government's internal ability to marshal that support to defeat terrorism.

Mr. LUNGREN. Time of the gentlelady has expired. Now the gentlelady from California is recognized for 5 minutes.

Ms. WATERS. Thank you very much. Mr. Chairman and Members. I think it's been stated more than once that it's unreasonable to expect us to be able to mark up this legislation any time soon, given the fact that not only have we just recently received information from the Administration, but some of it is conflicting, I think. But let me just ask a few questions, some of which may have been raised already. I would like a clear definition of our—and distinctions that are being made between an agent of a foreign government and a suspected agent with information, relevant information who may not be an agent of the government. Would you please, Mr. Eisenberg, tell me what distinction—distinctions are being made between—

Mr. EISENBERG. Well, I think the reason to add the agent of a foreign—as an agent of a foreign power, some non-U.S. person with significant foreign intelligence, which is a provision we would actually narrow is because it's not always clear there is an agency relationship.

Ms. WATERS. Would you speak a little slower and a little clearer.

Mr. EISENBERG. Sure. I think the point in Senator—in Representative Wilson's bill of adding that as an agent of a foreign power is that there are circumstances where non-U.S. persons possess significant foreign intelligence, and it's not clear whether they are or are not agents of foreign powers. We would actually narrow that a little bit.

Ms. WATERS. A little bit?

Mr. EISENBERG. Well, we would——

Ms. WATERS. Somebody would decide that there's somebody who is not an agent of a foreign government. You have not been able to tie them to that government. You're not able to connect them to the government, but you think they may have information that's relevant or pertinent that you could then place them under surveillance, is that correct?

Mr. EISENBERG. Essentially.

Ms. WATERS. So that could be anybody.

Mr. EISENBERG. No. It would have to be a non-U.S. person who has, in our view, some significant foreign intelligence information.

Ms. WATERS. Such as someone who works for a corporation maybe.

Mr. EISENBERG. I would comment on——

Ms. WATERS. I beg your pardon?

Mr. EISENBERG. I would not want to comment here on what an example would be.

Ms. WATERS. Well, let me ask you, since you are explaining to us what it is, could this person be a person who works for a United States corporation in a legitimate job, performing a job for a U.S. corporation?

Mr. EISENBERG. Under the proposal, as I understand it, if it's a non-U.S. person——

Ms. WATERS. Yeah. Non-U.S. persons do work for corporations. They are here on visas, they could be here, they could be in anyplace in the country—in the world, working for a U.S. corporation. These persons could be targeted because they have some trade secrets?

Mr. EISENBERG. I think that we would not be using it for trade secrets. I think that we would be using it when that's the only way we could gather foreign intelligence that's valuable to the United States.

Mr. SCOTT [continuing]. Foreign intelligence.

Ms. WATERS. Of course it could be. Absolutely. Do you recognize that we have cooperation with other countries where we trade information, usually it goes through some kind of process where it is the development of weapons or the kinds of things that we have decided to share information about that's legitimate, what if those persons or persons in these corporations could be considered a target because they have this information? Is that what you're telling me?

Mr. EISENBERG. Conceivably. I mean, in addition——

Ms. WATERS. I didn't hear. Conceivably? Is that what you said?

Mr. EISENBERG. That's what I said.

Ms. WATERS. Okay. Go ahead. Continue to explain.

Mr. EISENBERG. In addition, we would add another category which would be proliferators of weapons of mass destruction. Non-U.S. persons who are believed to be proliferators of weapons of mass destruction.

Ms. WATERS. Well, excuse me. Let me go to the gentleman.

Mr. FEIN. Number one, I think, Ms. Congresswoman, your question is pointed out the theory of the Bush administration, which is just, trust me, we only go after the bad guys with serious information. The answer here is suggested there is a word in the statute

that isn't there, significant foreign intelligence information, and only if it's necessary to thwart some dangerous plot. That certainly isn't the language here. It says any foreign intelligence information they are targeting and foreign intelligence information is defined to include anything relating to national security or foreign policy, like whether they know the internal politics of the government in Iran or in Pakistan or something of that sort. This is an invitation to surveil anybody under this, this open-ended definition.

Ms. WATERS. Yes. Did you have something else you wanted to say? I think that's what I've concluded. Thank you.

Mr. EISENBERG. Two additional points. Thank you.

Ms. WATERS. Yes, please.

Mr. EISENBERG. First, I don't think significant is in the bill. We would recommend that it be put in the bill and second, this would be pursuant to a court order.

Ms. WATERS. All right. So—did you have something you wanted to say about that, sir?

Mr. POTENZA. No ma'am. I just wanted to emphasize that what we're talking about here is changing the definition to allow us to get a court order.

Ms. WATERS. All right. But you don't define words like significant. That's left to one's imagination, I suppose.

Mr. EISENBERG. And the judge's.

Ms. WATERS. And the judge's imagination rather than the Constitution of the United States.

Mr. EISENBERG. Well, no, no, no. Any surveillance would have to satisfy the fourth amendment, and here a judge would be deciding if it does.

Ms. WATERS. You don't set forth for us in this bill what the judge should consider in determining what is significant.

Mr. EISENBERG. Well, FISA currently uses "significant." we have to certify that a significant purpose of the surveillance is to gather foreign intelligence information already. So it's a term that is already well within FISA.

Mr. LUNGREN. Okay. The gentlelady's time has expired.

Ms. WATERS. Thank you. Thank you very much.

Mr. LUNGREN. The gentleman from Massachusetts I think is pensive and ready to take his 5 minutes.

Mr. DELAHUNT. Thank you, Mr. Chairman. I'd like to just pose a question first to Mr. Fein and then to Mr. Eisenberg. I think it's important that the American people understand certain basics about the current state of the law. If al-Qaeda—if an al-Qaeda operative is calling from overseas and an American picks up the phone here in this country, does the current statute require the NSA to stop listening?

Mr. FEIN. No. That's the hypothetical, that's spherous and is repeatedly used.

Mr. DELAHUNT. Mr. Eisenberg, could you respond to that question?

Mr. EISENBERG. I would defer to Mr. Potenza, but I think it might depend on a whole lot of circumstances.

Mr. DELAHUNT. Okay. Mr. Potenza.

Mr. POTENZA. If we were collecting it in the United States, we wouldn't be doing it without a court order.

Mr. DELAHUNT. Mr. Fein.

Mr. FEIN. When the target is the foreign intelligence agency abroad, there's no reasonable expectation of privacy in the fourth amendment, as the Supreme Court has held, doesn't apply outside the continental United States. Now, there has been an advertence to a situation where if in an unusual way that there is a transit of a call into the United States so it's intercepted here, there could be a problem, but everyone agrees that's a fixed, that is acceptable. The basic fourth amendment doesn't apply—

Mr. DELAHUNT. Right. The President keeps saying that repeatedly, repeatedly, and let me suggest that that is misleading to the American people. Mr. Eisenberg.

Mr. EISENBERG. I'm not sure, but I think there may be a misunderstanding. Under current FISA, definition two, there doesn't have to be a reasonable expectation of privacy. All that matters is that there's a wire interception in the United States, and one of the communicants is in the United States.

Mr. DELAHUNT. And the NSA would not have to stop listening.

Mr. EISENBERG. Well, it would need a court order.

Mr. DELAHUNT. It would need a court order or what would implicated would be the emergency exception, the 72 hours to go and get the court order?

Mr. EISENBERG. Well that's actually not the way the emergency authorization provision works.

Mr. DELAHUNT. Okay. Explain.

Mr. EISENBERG. In order to go up in the emergency situation, we first have to assemble enough information so that the Attorney General can determine that the requirements of FISA are met, and only after the Attorney General makes that determination can the surveillance begin. And that's a process that could take as long as a normal application process to begin with.

Mr. DELAHUNT. Okay. Mr. Fein, would you care to respond, or Kate Martin?

Mr. FEIN. Did you want to—

Ms. MARTIN. Well, I just want to make an additional point. If the Government reads the FISA as requiring a court order to continue to listen to that conversation, they can go get a court order because, according to their description, there's no doubt but that there's probable cause that the person they're targeting is an agent of a foreign power.

Mr. DELAHUNT. Because they're aware of the fact that it's an al-Qaeda operative that is making the call.

Ms. MARTIN. That's right. And they can—

Mr. DELAHUNT. Because that is the target.

Ms. MARTIN. They go get a court order.

Mr. DELAHUNT. Would that be sufficient to secure a court order, Mr. Eisenberg?

Mr. EISENBERG. You would have to show to a court that there is probable cause to believe that the person is an agent.

Mr. DELAHUNT. In your opinion, a call from an al-Qaeda operative, would that be—

Mr. EISENBERG. Sure.

Mr. DELAHUNT. Would that be sufficient PC?

Mr. EISENBERG. Sure.

Ms. MARTIN. If I might add, and as I understand on the public record, this—they must determine before the conversation is received who they consider to be the al-Qaeda agent of a foreign power overseas. There's nothing blocking them from going and getting a court order saying, every time Mr. Al Qaeda calls into the United States, we want an order to listen to any phone call he makes into the United States or any phone call he receives from the United States.

Mr. DELAHUNT. Would you concur with the statement by Ms. Martin, Mr. Eisenberg?

Mr. EISENBERG. Can you repeat that?

Mr. DELAHUNT. No. We don't have time to repeat it. Let me just make an observation. It's been 5 years since 9/11. It's, I think, last December The New York Times reported the GSP, and it's 7 weeks to an election. And we're told that tomorrow we're having a markup of this bill. And to date, the Administration has not come forward with a draft proposal.

People can draw their own inferences. I happen to concur with the observations by Mr.—by Mr. Fein. I believe that there are some issues that are worthy of significant discussion, but to ask this Committee and this Congress to operate after two hearings in the past week and one briefing I think is not good policy making, to begin with, and not genuine consultation. You've had years now to bring forward these problems as they've emerged and to consult with Members of the Judiciary Committee who are here, sworn to uphold the Constitution. I just find it stupefying why, you know, there appears to be a sense of urgency, particularly, as you refer, Mr. Eisenberg, to that 42-page paper, where if you examine the rationale under article 2 and the Iraq War Resolution, you really don't need this anyhow.

You don't need the PATRIOT Act and you don't need FISA. You can do exactly what you want. I would request that you go back to your superiors and suggest that we enter a genuine consultative process that really works for the best interest of the United States and defends the Constitution. With that, I yield back.

Mr. LUNGREN. I thank the gentleman for yielding. And because of the good faith and treatise of your Ranking Member, Mr. Scott, we'll go to a second round here, as long as we all stay within our 5 minutes, except for the Chairman.

Let me give myself 5 minutes to start the second round. Both Eisenberg and Mr. Potenza, there's been the expression, vacuuming up of calls of U.S. persons, and that has sort of been just sitting out there. Can you tell us whether there are any protections outside of FISA that prevents the NSA from vacuuming up all calls of U.S. persons?

Mr. EISENBERG. Yeah. I'll start, and then I'll—

Everything that the United States has—all the activities of the intelligence community are under Executive Order 12333, or other like authorities, and they're all governed by procedures that are designed to protect the fourth amendment rights of U.S. persons. Information is minimized, that means whenever we acquire information, we always look to see what we can get rid of, what we don't need and we only retain what we actually need for the foreign in-

telligence mission. Congress serves an oversight function. There are plenty of oversights outside of FISA.

Mr. POTENZA. I would—I would just add that from the NSA perspective, the collection we do outside of FISA is—all of our—all of our collection, but particularly that outside of FISA is driven by specific intelligence requirements that are vetted and verified by the Director of National Intelligence. Our collection's then focused to try to identify the communications that will yield that information, information pertinent to that request. And we do that because in order for our activities to be constitutional, our searches must be reasonable, and they're reasonable because of the effort we make to select and filter communications.

Mr. LUNGREN. Let me ask you, for how long has the minimization program, minimization policy been in effect? Did it start with this Administration, did it start with FISA, did it start prior to that?

Mr. POTENZA. I can speak only with certainty from the late 1970's, and that's when they started. I got to NSA in 1980 and in the aftermath of the Church and Pike Committee investigations, the passage of FISA, and there were both statutory that the FISA minimization procedures, and then there were the minimization procedures required by each of the Executive orders that have been signed by the President, starting with the Ford Executive order.

Mr. LUNGREN. Ms. Martin, just a yes or no answer. Do you think there's any reason to streamline the FISA process?

Ms. MARTIN. I accept the Government's representation that the 45-pages are a problem for them. And that OIPR is a bottleneck and that OIPR perhaps needs streamlining.

Mr. LUNGREN. So here's the conundrum that I find ourselves in, that I find us in, and that is, FISA is based on a proposition that we must go before a court to show probable cause in those various categories to grant the authority to the NSA to do their work. The details that we have established requiring the Attorney General to make that finding have at least, it seems to me, proven to be difficult in that the Attorney General really wants to make sure that he's got probable cause under those circumstances, and it takes a great deal of operation, great deal of time not only by lawyers, but by analysts to do this in order to be able to achieve that.

If you would accept that, just—I know this might be a tough hypothetical for you, Mr. Fein, to accept, or Ms. Martin, if that be true, how would you suggest that we resolve that problem? If on the one hand we say, we want the attention of the Attorney General, not to delegate it to anybody else, we want this standard of proof, and that means we really have to—to provide it, and that all takes time, energy, effort, etc., how do we work ourselves through that problem? If you accept that that is a problem.

Mr. FEIN. Well, it seems to me, you could expand the 72 hours so that the Attorney General would not have to compile all of that information before beginning the surveillance, he would have then a time lay where then he would have an outside check by a judge. But I think you would need to remember, Mr. Chairman, that the purpose of FISA, the reason why we had it was because we had experience of 50 years of unchecked executive power to gather domes-

tic and foreign intelligence, and that was 50 years of substantial abuses.

As Brandeis said, sunshine is the best disinfectant, and that is part of the reason why you have at least the sunshine of a FISA court to look at these things. Everyone would agree if there's no possibility of abuse then surely it's silly to just impose administrative burdens and these standards that have to be shown to a court.

But history is the opposite. There are abuses when you don't know what is going on, and you would just have one branch looking at itself. You may recall recently the fiasco of the NSA telling the Department of Justice, hey, you can't have security clearances to come and examine the authorization we had to begin this domestic surveillance problem. It wouldn't even trust its own Department of Justice.

Mr. LUNGREN. Maybe I could ask Mr. Eisenberg and Mr. Potenza, as my time is about ready to run out.

Mr. DELAHUNT. Mr. Chairman, I ask unanimous consent that the Chair grant itself as much time as it needs or wants.

Mr. LUNGREN. I appreciate that. Well, now it's only two to one. It was four or five to one there for a while before. Mr. Eisenberg and Mr. Potenza, what is wrong with the 72-hour exception or expanding the 72-hour exception to 2 weeks, or whatever it is?

Mr. EISENBERG. Ultimately, I don't think that that is the answer, although expanding the time could help in many ways, but as I explained earlier, before we can start surveillance, whether it's a 72-hour period, a 2-week period, whatever, the Attorney General has to, before that point, determine that the facts exist to satisfy the requirements of an application. We can't just flip a switch, go up for some amount of time and then make it okay later. We've got to go—

Mr. LUNGREN. He has to make that determination before you actually begin the—

Mr. EISENBERG. That's correct. And if, in the event we don't end up filing an application, or if the court were to deny it, there's a presumption in the statute that it's disclosed to a U.S. person. So there are tremendous incentives against doing this.

Mr. LUNGREN. Mr. Potenza.

Mr. POTENZA. I would just like to add that—that in our—the focus, as at least we understand it, is to not—is to focus on what we intend to protect, the rights of those persons entitled to privacy protection under the Constitution, and to refine the system, given modern telecommunication—the modern telecommunication world so that we're not affording those protections inadvertently to persons overseas who may pose a threat to the United States.

Mr. LUNGREN. All right. I'll yield. I've gone over my time. Mr. Scott, you have 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. On page 2, line 5, it says "D, possesses or reasonably expected to transmit or receive foreign intelligence information while in the United States." now who does that apply to? The way the bill is written, it's a little unclear.

Mr. EISENBERG. I believe it would apply to a non-U.S. person who possesses intelligence.

Mr. SCOTT. And so what happens—what is that amending?

Mr. EISENBERG. The definition of an agent of a foreign power in FISA.

Mr. SCOTT. Okay. So now anyone who possesses, or is reasonably expected to transmit or receive foreign intelligence information, we've already ascertained that foreign intelligence is not national security terrorism. It could mean anything that helps foreign policy along like a trade deal, digging up dirt on foreign—on public officials that might help us negotiate with them, anything on foreign intelligence, is that right?

Mr. EISENBERG. Well, foreign intelligence is actually defined specifically in FISA.

Mr. SCOTT. That's right. Anything that helps along the foreign policy, helps us negotiate a trade deal or anything else. Also terrorism.

Mr. EISENBERG. No, no. It's actually far more narrow than that. Mr. SCOTT. What does foreign intelligence mean?

Mr. EISENBERG. It means—

Mr. SCOTT. Go down to that catchall phrase down at the end, the last one.

Mr. EISENBERG. Well, it's section 101(e) of FISA. And I would just recommend you to read it.

Mr. SCOTT. Anything helping along the foreign policy.

Mr. EISENBERG. No. 101(e) 1-A, for example, talks about actual or potential attack or other grave or harmful acts—

Mr. SCOTT. Keep going.

Mr. EISENBERG [continuing]. Of a foreign power.

Mr. SCOTT. So you are scaring people to death with the terrorism, but keep going.

Mr. EISENBERG. Next one. Sabotage or international terrorism.

Mr. SCOTT. Keep going.

Mr. EISENBERG. Clandestine or—

Mr. SCOTT. Keep going.

Mr. EISENBERG. That's it. Except for intelligence with respect to a foreign power or concerning a U.S. Person that is necessary to the security of the United States or the conduct of the foreign affairs.

Mr. SCOTT. Ah! What's that last one? Say that last one again. You have been scaring people to death on the terrorism and now you finally get to the end that I've been trying to get you to. Foreign policy.

Mr. EISENBERG. Necessary to the conduct of the foreign affairs. I mean, necessary.

Mr. SCOTT. Necessary to the foreign—yeah, like negotiating a trade deal.

Mr. EISENBERG. That's one heck of a trade deal.

Mr. POTENZA. It could be, but if the judge were persuaded that that was foreign intelligence information, the judge would approve the surveillance.

Ms. MARTIN. Could I just—

Mr. SCOTT. Ms. Martin.

Ms. MARTIN. You know, it seems to me this is an example of how this complex bill could not be understood between now and tomorrow because I heard my colleague say that the amended definition of an agent of a foreign power applied to the situations where they

get a court order but that's not how I read the bill. The bill in section 3 expands the situation when they can do warrantless surveillance on the certification of the Attorney General. And it refers to an agent of a foreign power as defined in section 101(b)(1). That's the section that Chairman—Mr. Scott, that you were just referring to, is amended by the statute to make it much more than a suspected terrorist. And it's this kind of confusion about what the bill actually accomplishes.

Mr. SCOTT. Mr. Fein, what is foreign intelligence?

Mr. FEIN. It includes, as you pointed out, anything relating to our ability to conduct foreign relation.

Mr. SCOTT. So when they scare you with the terrorism, it also includes—

Mr. FEIN. Well, things like what is the—what are the reserves that are being held in the Central Bank of Iran, what are the trade deficits in China? What would help us negotiate a free trade deal with Bahrain. All of those things are foreign intelligence within the meaning of the statute, all of them are open-ended and really place no serious limits on surveilling anyone.

Mr. SCOTT. Now Mr. Fein, Administration officials have gone to great lengths to show that their checks and balances and they have Executive orders and Attorney General and everybody within the executive branch checking and balancing on itself. What's wrong with that?

Mr. FEIN. Well, that's certainly not the envision of the Founding Fathers who didn't think checks and balances was checking yourself. Checks and balances is what they called making ambition to counteract ambition, having a different branch of Government with a different agenda, making that examination and survey. That's precisely why this branch in FISA required that a court examine the validity of the facts asserted to establish probable cause. And you can imagine that within the executive branch, in NSA, the professionals who single out people for surveillance aren't going to get punished for spying too little. They get promoted the more intelligence they gather.

That's what their mission is. Their mission isn't to cease spying because they think the fourth amendment is a problem. That's precisely why you need a real check outside the executive branch if this is going to function. And I want to return to history. There were 50 years of unchecked electronic and other surveillance for foreign and domestic purposes where the Administration did just what they're saying. We all checked ourselves, the Attorney General checked what the CIA and FBI was doing, you can open mail without any violations of the law. That's why we had FISA. It didn't just fall from the sky by Congress wanting to be pestiferous and hamper the executive branch. We shouldn't forget that. Human nature doesn't change with regard to power.

Mr. LUNGREN. Mr. Scott.

Mr. POTENZA. Mr. Chairman, may I just have a second? I must respond to that. I can't sit here and let someone suggest that the men and women at the National Security Agency are running amuck. That is simply false. We do, outside of FISA, the collection against foreign targets where we, incidentally, acquire information to, from or about U.S. persons every day. That process has been

overseen for 25, 26 years by the Intelligence Committees, and it's been validated as lawful by the Department of Justice and compliant with the fourth amendment.

So it's simply false to suggest that the men and women of the Agency don't know what the rules are, don't follow the rules, and that we don't have mechanisms to comply with those rules and to check that compliance and that there are not external bodies to come in to check that.

Ms. MARTIN. Mr. Chairman, if I might, we don't mean to suggest that the men and women of the NSA do anything other than operate within the rules and the orders that they are given by the political people in charge of the agencies and in charge of the White House. It has nothing to do—I am sure that Mr. Potenza and the rest of the career people follow the laws and follow the President's orders. We are talking about the President's orders here.

Mr. LUNGREN. I thank the gentleman for his question. I would just say, I think Mr. Potenza also said there was oversight done by the intelligence Committees, of which I used to be a Member. And unless they're doing absolutely nothing, there is at least that check.

Mr. SCOTT. I think there's a difference between telling the Intelligence Committee what you're doing under threat of imprisonment if they tell anybody, and a check and balance that can actually stop the proceedings from going forward.

Mr. LUNGREN. I appreciate the gentleman's comments. If that's a problem, then maybe we in Congress ought to look at the laws that we set up with respect to how the intelligence Committees operate.

Mr. DELAHUNT. Would the gentleman yield?

Mr. LUNGREN. Like I pointed out before, the ultimate power we have under the Constitution is the power of the purse. Power of the purse I assume presumes that we are informed. The intelligence Committees have the responsibility to keep us informed. If they are not doing that, then we ought to be the ones——

Mr. DELAHUNT. Would the Chair yield?

Mr. LUNGREN. Well, it's on Mr. Scott's time, even though it's over time.

Mr. DELAHUNT. I hear what you are saying, but the reality is, a short time ago my memory is that the Chairman of the Intel Committee, the Republican Chairman, Mr. Hoekstra, sent a letter or expressed publicly his concern about the lack of cooperation coming from the Administration. If we want to talk about oversight and congressional oversight, I think we've got to be honest with the American people. It is not happening.

You and I both—well, the Department of Justice, for example, can you remember the last time that the director of the FBI appeared before either this Committee or the full Committee? How many appearances has Mr. Mueller made in front of this Committee?

Mr. LUNGREN. Well, all I know, since I've been here, once.

Mr. DELAHUNT. Once? I can't remember a single time since he's been appointed. My point is——

Mr. LUNGREN. Well, I was here. And I appreciate the gentleman's comments. But we are——

Mr. DELAHUNT. But we're talking about oversight as somehow that's going to be the remedy, and again,—

Mr. LUNGREN. Maybe under the Constitution it is. The gentlelady from Texas is granted 5 minutes.

Ms. JACKSON LEE. Thank you, Mr. Chairman. And I want to echo I think the remarks even more strongly than Ms. Martin made to Mr. Potenza and to Mr. Eisenberg. It is not a question of the individual patriots that work for this Government. We recognize and respect your love and affection for this Nation, and your desire to secure her. But I think as I am reminded of the fledgling 13 Colonies, the basic anchor and message of those constitutional writers was the preservation of liberty, certainly the checks and balances that would be quite different from the structures of Government and what they perceived to be oppression that they fled.

And that is, even today, equally important, that putting aside the personal integrity of any of those who work for any of the agencies that are now before this Committee, there are certain other intervening factors, and that is to the allegiance of the Commander in Chief of which you work for, and the call of that political office to give directions that may contravene the liberties of the people we have an obligation to protect. One of the—and I want to be redundant. You don't like to, but I do want to be redundant in that there is an unreadiness here, and I believe that we are moving in the wrong direction rapidly without further review of this legislation, without a more cooperative collaboration.

I recall that I don't see a statement from the Administration. I've heard—both of you indicate we're going to do this or we're going to do that. So I assume you're either going to funnel amendments in, 24 hours, I guess you expect to have them in tomorrow. I don't believe that that's sufficient time for review. But let me now proceed with my line of questioning, and I am going to go back to the arguments of definition. I am going to start, Mr. Fein, this time because I went back to the language. I thought I was going to find terrorist attack in the Wilson bill.

I don't know if I would find it in the FISA. I believe not. And I want to—again, whether or not it is seemingly political for me to try to analyze it from a political perspective, I am outraged when there is the smear or the taint that when you speak about civil liberties, all of a sudden you become a nonpatriot, and you are putting this Nation in jeopardy, and as a Member, as I said, of the Homeland Security Committee, I take the security issues and concerns of this Nation to heart, as I know that my colleagues do as well.

But at the same time, we are looking at a bill, and the reason why I keep raising the Wilson Bill is it's before us tomorrow. And it does say simply that the President can declare this 45-day no constraints whatsoever, following a terrorist attack against the United States. Does not say on United States soil. Does not equate to the 9/11 horrific tragedy, which we frankly understand, but it says against the United States. So you know just recently, which I abhor, and we certainly appreciate what seems to be the fast action of the Syrian government, but as you well know, there was an attack on the Syrian U.S. Embassy that triggered, that was against

the United States, and we're very grateful for the lack of loss of life of Americans.

But the question is, would that trigger a warrantless search for individuals who might have been calling their mother-in-law in the region? And let me just finish by suggesting—and I also notice that this allows a President to submit a notification to each Member of the congressional Intelligence Committee, and a judge having jurisdiction in the section would find and then it goes along those lines, but again, it's important to isolate this feature that we're talking about, that I don't think Americans know what they're getting themselves into.

And if you could just be clearer on how we can secure the homeland and that by arguing against this randomness, that we're not undermining it.

Mr. FEIN. Well, first, with regard to the definition of a terrorist attack against the United States, because there's not a special definition in the statute, the ordinary plain meaning of the word. Attack against the United States would mean anytime our soldiers in Afghanistan are attacked by Taliban, which is every day, that's an attack against the United States.

Ms. JACKSON LEE. Because there's no limitations.

Mr. FEIN. There's no limitations at all. It doesn't say how large it has to be, it doesn't say if the attack succeeds. It just means that there is an attack. Every day in Iraq, our soldiers are attacked by terrorists.

Mr. LUNGREN. Without objection, the gentlelady is given two extra minutes.

Ms. JACKSON LEE. You are very kind, Mr. Chairman. Thank you so very much.

Mr. FEIN. With regard to protecting the United States and the American people, certainly that has to be a very paramount concern. The Constitution is not a suicide pact but surely a free government has to take some modest risks in order to keep a democratic and free country alive. If we decided we would place security above all else, we would simply eliminate the fourth amendment with regard to everything. We would have a gestapo. We would policemen at every corner. We would let no one into the United States.

We would say oh, you can't criticize the Government because that would embolden the enemy. We have heard if you voted against Joe Lieberman, that is emboldening the enemy, so that could be made a crime. If the sole purpose was just security, that's why you have to have some measured balance between the two.

And the history of the FISA has shown, even after the warrantless surveillance program began, that it has worked effectively as was amended by the PATRIOT Act. And I go back to the same Department of Justice, July 31, 2002, FISA is impeccable, it's flexible, it's nimble, it enables us to thwart terrorists in the bud. What has changed since that time? It doesn't seem to me there's any showing that these loopholes are necessary to increase our safety.

Ms. JACKSON LEE. Thank you. Mr. Eisenberg, we submitted to you a resolution from distinguished gentleman, Mr. Wexler, to get a number of documents. What is the status of that resolution? And

do you have a sentence to tell me whether or not you were handcuffed before 9/11 because you did not have the Wilson bill?

Mr. EISENBERG. I'm sorry. I actually don't know what the status of the Wexler—

Ms. JACKSON LEE. Was anyone—because this was unanimous out of this Committee, we've heard nothing to provide us with documents, and I am wondering why the act of a congressional Committee such as the Judiciary Committee has not been responded to.

Mr. EISENBERG. All I can do is promise to get back to you.

Ms. JACKSON LEE. I hope that is the case. Did you hear if the Wilson bill would have helped you, didn't FISA provide all the documents necessary if it had been acted upon with respect to 9/11?

Mr. EISENBERG. Would the Wilson Bill have helped us avert 9/11?

Ms. JACKSON LEE. Had any impact on it, yes.

Mr. EISENBERG. It's obviously very difficult to make such a determination, and I will defer to Mr. Potenza, but my guess is that it would have. It would have gone a long way toward that by allowing surveillance in international communications and allowing NSA to be able to do its activities more easily.

Ms. JACKSON LEE. But you would have needed to have the intelligence and my understanding was the intelligence was already here on the ground, we just didn't connect the dots. We didn't get the two intelligence entities together, which is I think a totally different issue from surveillance. Mr. Potenza, do you have any insight on that?

Mr. POTENZA. I can't say a lot on the public record, but if we had had this authority, we do think there would—we would have been able to target some foreign targets that might very well have not prevented 9/11, but perhaps identified significant lead information.

Ms. JACKSON LEE. But you would have had to have had the intelligence to do so as well.

Mr. POTENZA. We did have—we did have intelligence about foreign information. What we lacked was a connection between that foreign information and the United States.

Ms. JACKSON LEE. Mr. Chairman—

Mr. LUNGREN. Because of my inability to handle the light, I've actually given the lady an extra 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, Mr. Chairman, let me yield back to you. And just say on the public record, there lies the basis of having more security briefings because Mr. Potenza has now just opened up another can of worms, and obviously we need to pursue that in a secured briefing.

But I would officially like to mention on the record that we would like a response. I think it was out of the Committee, either unanimous or bipartisan, on the Wexler resolution, and I would appreciate some reference from the Committee going forward to the Department of Justice. I thank you very much and yield back.

Mr. LUNGREN. I thank the gentlelady for yielding. I just—before I recognize my friend from Massachusetts, just mention to the gentleman, Mr. Fein, that I recall the words of Whizzer White, when he was dealing with this issue, and from a fourth amendment analysis, and he suggested that the President does have some primacy in this area, and suggested that that had been recognized since the

beginning of the Republic and suggested that the President ought to maintain hands-on in any such foreign surveillance activity and that he have his Attorney General involved in a hands-on capacity.

So, I mean, there has been recognition of a certain unique status that the President of the United States has with looking at foreign intelligence. And what I am trying to find out is, how we in the Congress appropriately exercise our jurisdiction, and it seems to me that the power of the purse is essentially where our power lies, and that, therefore, it's a matter of proper information given to the Congress. Maybe that gets us out of this issue of how we can foreclose activity to the President given to him by the Constitution with statute. The gentleman from Massachusetts is recognized.

Mr. FEIN. If I could just respond to your general observation. Justice White was certainly correct, and no one has disputed that in the absence of any congressional action, the President has inherent authority to gather foreign intelligence. The issue is does Congress have any authority to regulate, not to limit that. And it's important to remember that FISA governs maybe a fraction of a percent of all the foreign intelligence that the President gathers outside of FISA because it's abroad. The NSA, in your last hearing, testified to that extent. So we are asking whether the Congress can regulate, not eliminate, the small slice of the President's authority to gather foreign intelligence, and surely the necessary and proper clause covers that if it covers anything.

Just think of the implication, Mr. Chairman, if Congress lacks any authority to regulate this tiny ability of the President to conduct foreign intelligence, then what authority does it have over anything that applies to the President whether it relates to law enforcement or otherwise setting priorities. If you say it's an executive power, the Congress has nothing to do with it, then that really means we have one branch of Government.

Mr. LUNGREN. The executive power is very limited to certain circumstances, and that is recognized from the beginning of this Republic of the gathering of foreign intelligence. Now, I think we could argue about whether or not that should be limited to areas of conflict as opposed to trade policy, and I would certainly look at that. But it just seems to me, you do have a Commander in Chief, you do have a recognition of sort of singular decision making. I mean, I recall that Benjamin Franklin even recognized that one of the reasons he wanted to restrict some information to a Committee of Congress is that Congress couldn't keep secrets, but that was then and we know things have changed since then. Gentleman from Massachusetts.

Mr. DELAHUNT. Yeah. You know, I think, Mr. Fein—I want to just comment on Mr. Fein's answer because I think he's correct. There's a balance here, and I would suggest, Mr. Chairman, that the balance is tipped toward the executive to such an order of magnitude that it puts the constitutional order at risk. This debate, or this discourse that we're having here now, is truly about the role of judicial intervention, to serve as a check and balance, and what we see is arguments coming from the executive, you know, to sum it up, just trust us, we have all these controls, and I am confident that these men and women that sit here are complying with that.

Mr. SCOTT. Would the gentleman yield?

Mr. DELAHUNT. Of course.

Mr. SCOTT. Gentleman suggested there's a balance. There's no balance at all when all you're asking the President to do is get a warrant. It's not a question of whether he listens in, it's a question of just whether he just goes through the routine of an *ex parte* proceeding where the other side has no ability to gather evidence, and you are—you just certify to a court in getting a warrant. I mean, you're not validating, you're not questioning whether he can listen. The question is whether you have the traditional checks and balances.

Mr. DELAHUNT. That was, that was my observation about the role of the judiciary. And judicial intervention, and it concerns me to hear—and I know that, you know, these decisions are made at a different—at a different rate and that policy is established far beyond these men that are representing the Government here. But I concur with Mr. Fein and others that express a profound unease about what is happening. And what I further want to suggest is, that I am, that I am very disturbed and disappointed in the consultative process that has not existed between the Executive and this Committee specifically over the course of the past 6 years. This is not good legislating, doing this on the fly. We're winging it here today, going into this hearing tomorrow, and it does not serve the American people well.

Mr. LUNGREN. Would the gentleman yield for just a moment?

Mr. DELAHUNT. Of course.

Mr. LUNGREN. That's why we talk about checks and balances. I understand what you're saying. It seems to me in this area, the checks and balance ought to be between the Executive and the legislative branch more than the judicial branch, and the reason I say that is when you're talking about matters of war, when you're talking about matters of defending yourself against a foreign enemy, it seems to me the Constitution would suggest that the two branches that ought to be—would have the prime responsibility in that would be the legislative and the Executive rather than the judicial.

In that case, I would suggest that it's a question of us making sure that we get the proper information so that we can act with the power of the purse and that may require us to make some changes with how we operate our Intelligence Committees in the manner in which they are able to work with the other Committees of the Congress.

Mr. DELAHUNT. I hear the Chair's concern, and I don't disagree, but there's another half to this. And this is the right of privacy and the fundamental civil liberties of all individual Americans. That's why we go to war.

Ms. MARTIN. Mr. Chairman. Mr. Chairman, it if I might—

Mr. LUNGREN. Let me just say, just remind the gentleman that we're going to break at 6. If he wants to direct any questions to our panelists because we promised—

Mr. DELAHUNT. Ms. Martin, you go ahead and say what you want to say.

Ms. MARTIN. I would just like to point out that the executive branch asked the Congress to establish the foreign intelligence surveillance court in order to facilitate the gathering of foreign intelligence in a way that advanced both its national security interests

and the civil liberties, and that that was fundamentally what was envisioned by the Congress, and that this conversation about somehow, the Wilson bill and its allowance of warrantless surveillance would have been helpful before 9/11 seems to me off point.

What the Wilson bill is not about is says no warrants. We all agree that terrorists should be surveilled and we all agree that they can surveil foreigners overseas without any court order. The question is, should they be able to surveil individuals inside the United States without a warrant? And they have given you no argument—

Mr. DELAHUNT. Reclaiming my time, and the Chair knows, there's been 20,000 applications under FISA, and there is—I think in single digits, the number that have been rejected. With all due respect to the professionals and the career people, you know, maybe there is inconvenience. Maybe there is some burdens involved because of circumstances, but at the same time, I have to tell you, I have not heard of sufficient burdens that would lead me to support anything but the existing statute. If there are issues and if there are concerns, let's do it right. Let's do it in a way that's thoughtful.

You know—and again, this is not directed at the career professionals. Everybody in this panel knows that this thing's going and it's going tomorrow, because we have a mid-term election up and the theme is, you know, national security because the majority party feels that's their strength. I would argue that it's—it is not good legislating. It's not good policy making because this is so important. Let me just end with one final question that has been given to me. Why does the Department of Justice and NSA feel that 102(a) needs amendment?

Mr. EISENBERG. Well, I mean I think in part it needs to be amended because the current 102(a) basically has—as I understand it, and Mr. Potenza can correct me, has almost no effect.

Mr. POTENZA. I'm not—I'm not sure, Congressman. We could—we could get back to you with a specific answer on that rather than try to—

Mr. LUNGREN. He was just—

Mr. DELAHUNT. I just want to—I'm ready to stay here until 10 tonight.

Mr. LUNGREN. Well, the wincing hour having arrived, we promised we would be finished by 6. I thank everyone for their attendance. I thank the witnesses for their testimony. The Subcommittee very much appreciates your contribution. In order to ensure a full record and adequate consideration of this issue, the record will be open for additional submissions for 7 days. Any written questions that a Member wants to submit should be submitted within that same 7-day period. This concludes the legislative hearing on H.R. 5852, the Electronic Surveillance Modernization Act. Thank you for your cooperation. And without objection, Subcommittee stands adjourned.

[Whereupon, at 6:01 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman. I appreciate your holding this additional hearing on this important issue affecting our traditional notions of rights, liberties and protections from government intrusion into our private affairs in a context of secret surveillance without the benefit of court approval, or review. One of the reason I felt we needed to hear more about the impact of the pending legislation is because I feel we are in the dark about what the legislation affects. Let me be clear, the primary problem confronting the Congress, in my view, is the issue of whether we are performing our constitutional oversight responsibilities when we do not hold the Administration accountable to following the process we set up for conducting surveillance involving American citizens in America.

If there is some difficulty with the procedures, I expect the President to bring those to our attention and work with us in our attempt to address them, just as he has done with the USA PATRIOT bill and the 25 amendments to FISA we have passed since the 9/11 terrorist attacks. I do not expect the President to ignore the laws we passed because he considers them inconvenient, or to set up his own secret process around the laws that he only reveals when he is caught, declaring that he is following his own set of laws and procedures he wrote pursuant to powers he declares himself to have under the Constitution. I find it insulting and disingenuous to our system of laws and procedures for someone to suggest it is inconvenient for the President to comply with them by obtaining a warrant or a court order. If he is doing what he has chosen to indicate he is doing—surveilling only Al Qaeda members and those they are in contact with here, I am confident the FISA court would approve a warrant for that. Consequently, I am left to wonder whether the real reason the Administration does not submit the matter to the FISA court is because of concerns that the available information would not justify a warrant. The problem is we don't know and I believe our oversight responsibility requires us to know and assure the American people that the President's surveillance activities are within the rule of law.

And if the rationale of the legislation is that we are amending FISA with the hope that the President will then find it enough to his liking to use it sometimes, when he doesn't choose to keep his actions in complete secrecy, I am not clear on the need or the desirability of such legislation. In other words, if this legislation does not control the parts of TSP affecting American citizens in America, what is the point of it? I think our Founding Fathers would be shocked to learn that they had created an unbridled power in the President to secretly conduct surveillance involving Americans in America without approval of the courts and I do not believe the courts will find that they did. So I certainly do not want to see legislation that would purport to establish or recognize such a power in the President, as I fear the bill before us does.

And even if I were sure this legislation required the President to conduct domestic surveillance pursuant to it, I would be concerned about the broad loopholes it creates in taking currently covered surveillance activities outside of FISA through redefining what constitutes "electronic surveillance." I would also be concerned with what we mean by provisions in the bill such as what constitutes an "armed attack" against us triggering the warrantless 60-day window? Was the attack on the American Embassy in Syria this morning an armed attack that would invoke a 60-day warrantless period in this country?

I would also want to know what is meant by "terrorist attack" in the bill which invokes potentially endlessly renewed 45-day warrantless periods. Does it include

attempts or conspiracies to launch a terrorist attack? If not, why not? Was the recent plot discovered in Great Britain to blow up planes headed for America such a terrorist Attack?

These are just a few of the problems I have with the bill in the context under which we are considering it. So, I look forward to the testimony of our witnesses, Mr. Chairman, with the hope they will be able to enlighten us on these and other issues and concerns with the legislation. Thank you.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE
ON THE JUDICIARY

Let me state at the outset that I strongly support intercepting each and every conversation involving al-Qaeda and its supporters—whether in the United States or abroad. Having said that, I have serious concerns about this Committee taking up legislation that simply codifies an unlawful surveillance program and which further and unjustifiably expands the President's authority. My concerns include the following:

First, it has yet to be explained why we need to gut the Foreign Intelligence Surveillance Act (FISA) and the Fourth Amendment in order to protect our citizens. The current law already allows for streamlined court approved wiretaps and includes an emergency exception which allows wiretapping without a court order for up to 72 hours. If the Attorney General needs more resources, additional time, or the ability to delegate this responsibility to other trusted officials, I am sure the Members of this Committee could come together to do that. However, there appears to be no cause to revamp FISA on the fly and permit the wholesale interception, storage, and unlimited usage of the contents of the communications of innocent Americans without a warrant.

Second, this Committee continues to be handicapped by the fact that nearly nine months after we first learned of the warrantless surveillance program, there has been no attempt to conduct an independent inquiry into its legality. Not only has Congress failed to conduct any sort of investigation, but the Administration summarily rejected all requests for special counsels as well as reviews by the Department of Justice and Department of Defense Inspector Generals. When the DOJ Office of Professional Responsibility finally opened an investigation, the President himself squashed it by denying the investigators security clearances. Furthermore, the DOJ has completely ignored the numerous questions posed by this committee, the Wexler Resolution of Inquiry we previously adopted, as well as our request for a full classified briefing on the program.

Third, we have not received a shred of evidence that the domestic spying program has led to actionable intelligence involving terrorism. FBI Director Mueller has stated that the warrantless surveillance program had not identified a single Al Qaeda representative in the United States since the September 11 attacks. A former prosecutor stated that "[t]he information [from the program] was so thin, and the connections were so remote, that they never led to anything, and I never heard any follow-up." An FBI official said the leads were "unproductive, prompting agents to joke that a new bunch of tips meant more calls to Pizza Hut."

So, given that emergency wiretaps are permitted under FISA, there has yet to be an independent review of the facts surrounding the domestic spying program, and the program has not yielded meaningful intelligence, how is it possible that this Committee and this Congress appear to be on the verge of ratifying and enlarging an unlawful program two weeks before we adjourn? The GOP Leadership told *The New York Times* last week—they want to spend the next few weeks "concentrat[ing] on national security issues they believe play to their political strength." In other words, its politics, plain and simple.

If Congress were really serious about fighting terrorism, we would fully implement the 9/11 Commission recommendations. If we were truly interested in airline security, we would have developed a system to identify liquid explosives and to screen and inspect commercial air cargo. If we really cared about port security, we would screen more than 3% of containers before they enter our country, and secure our chemical plants. If we really cared about nuclear proliferation, we would work with the members of the former Soviet Union to adequately secure their "loose nukes." If we were serious about capturing or killing bin Laden, we wouldn't have outsourced the job to Afghanistan or broken up the CIA's bin Laden unit. And if we truly wanted to prevent terrorism, instead of spending \$2 billion per week occupying Iraq, we would use those funds to protect our Nation and secure our borders.

I believe that the lesson of the last five years is that if we allow intelligence, military and law enforcement to do their work free of political interference, if we give them requisite resources and modern technologies, if we allow them to “connect the dots” in a straight forward and non-partisan manner, we can protect our citizens. We all want to fight terrorism, but we need to fight it the right way, consistent with our Constitution, and in a manner that serves as a model for the rest of the world. This bill does not meet that test.

